Supreme Court, U. S.
FILED
JUN 8 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1976

No. 76-1739

BRUCE JOHNSON, a minor, by Earl D. Johnson, his guardian *ad litem;* LISA JACKSON, a minor, by Doreen G. Jackson, her guardian *ad litem;* DAWN JACKSON, a minor, by Doreen G. Jackson, her guardian *ad litem;* ROBYN DEXTER, a minor, by Alice Dexter, her guardian *ad litem,* and MICHELLE HENRIOT, a minor, by A. W. Henriot, her guardian *ad litem,*

Petitioners,

vs.

HUNTINGTON BEACH UNION HIGH SCHOOL DISTRICT, RALPH H. BAUER, as trustee of Huntington Beach Union High School District; RON SHENKMAN, as trustee of Huntington Beach Union High School District; ROBERT A. KNOX, as trustee of Huntington Beach Union High School District; HELEN E. DITTE, as trustee of Huntington Beach Union High School District; DON McALLISTER, as trustee of Huntington Beach Union High School District; and DOE ONE through DOE TWENTY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI

Of Counsel:

KENNETH A. ROBERTS
210½ Main Street
Huntington Beach, Ca. 92648
Telephone - (714) 536-6559

THOMAS M. WHALING
218 Main Street
Huntington Beach, Ca. 92648
Telephone - (714) 536-8841

Attorney for Petitioners.

Dean-Standefer, 326½ Main St., Huntington Beach, Ca. 92648 - (714) 536-7161

TOPICAL INDEX

	Page
Introduction	1
Jurisdiction	2
Reasons for Granting the Writ	3
Statement of Facts	4
Constitutional Provisions Involved	6
Argument	7
I In the context of an ongoing program of recognizing student organizations, and granting use of school facilities for meeting and communication purposes, a school district is not prohibited by the United States Constitution from granting the same privileges to a student group with religious interests as are granted to student groups with secular interests	7
A. The Establishment Clause does not purport to forbid the granting of recognition and/or facilities use to these students	7
B. Assuming [*arguendo*] that the Establishment Clause is really involved in the issue set forth hereunder, the value of the rights sought to be protected by the Establishment Clause are outweighed by the value of other First and Fourteenth Amendment rights	19
(a) Traditional First Amendment rights of free expression and assembly	22

TOPICAL INDEX

Argument (cont'd) — Page

(b) The right to the free use of a public forum, a modern penumbral right of constitutional dimension 25

(c) Equal protection of the laws 26

II In the context of an ongoing program of recognizing student organizations and granting use of school facilities for meeting and communication purposes, a school district is not prohibited by the California Constitution from granting the same privileges to a student group with religious interests as are granted to student groups with secular interests 28

A. Article IX, Section 8, does not forbid the activities proposed by petitioners 28

B. Article XVI, Section 5, does not forbid the activities proposed by petitioners 30

III In the context of an ongoing program of recognizing student organizations and granting use of school facilities for meeting and communication purposes, if any provision of the California law (including the California Constitution) purports to prohibit a school district from granting the same privileges to a student group with religious interests as are granted to student groups with secular interests, such provision of California law violates the United States Constitution and is invalid 31

TOPICAL INDEX

Argument (cont'd) — Page

A. Such a provision would violate the Establishment Clause 32

B. Such a provision would violate the Free Exercise of Religion Clause 33

C. Such a provision would violate the Freedom of Expression and Freedom of Association Clauses, the right to Free Use of a Public Forum, and the Equal Protection Clause 34

D. Board Rule 5144 and Staff Rule 5144 [set forth at footnotes 2 and 3, Appendix pages 2 and 3] violate the Due Process Clause 36

Conclusion 37

Index to Appendix

Appendix "A" through "E"

TABLE OF AUTHORITIES CITED

Cases

Abington School District v. Schempp (1963), 374 U.S. 203, 83 S. Ct. 1560, 10 L. Ed. 2d 844 ..... 9, 10, 11, 16, 32

American Civil Liberties Union v. Radford College (1970), 315 F. Supp. 893 ..... 23, 24

Braunfeld v. Brown (1961), 366 U.S. 599, 81 S. Ct. 1144, 6 L. Ed. 2d 563 33

TABLE OF AUTHORITIES CITED

Cases (cont'd)	Page
California Educational Facilities Authority v. Priest (1974), 12 Cal. 3d 593	30
Committee for Public Education v. Nyquist (1973), 413 U.S. 756, 93 S. Ct. 2955, 39 L. Ed. 2d 948	17, 18, 19, 32
Danskin v. San Diego Unified School District (1946), 28 Cal. 2d 536	27
Edwards v. South Carolina (1963), 372 U.S. 229, 83 S. Ct. 680, 9 L. Ed. 2d 697	19
Engel v. Vitale (1962), 370 U.S. 421, 82 S. Ct. 1261, 8 L. Ed. 2d 601	9, 16
Everson v. Board of Education (1947), 330 U.S. 1, 67 S. Ct. 504, 91 L. Ed. 711	37
Freedman v. Maryland (1965), 380 U.S. 557, 85 S. Ct. 734, 13 L. Ed. 2d 649	34
Gay Students Organization v. Bonner (1974), 509 F. 2d 652	24
Gordon v. Board of Education (1947), 78 Cal. App. 2d 464	29, 30
Healy v. James (1972), 408 U.S. 169, 92 S. Ct. 2338, 33 L. Ed. 2d 266	8, 22, 23, 24
Hudson v. Harris (1973), 478 F.2d 244	23
Johnson v. Robinson (1974), 415 U.S. 361, 94 S. Ct. 1160, 39 L. Ed. 2d 389	35, 36
Jones v. Board of Regents (1970), 436 F.2d 618	37

TABLE OF AUTHORITIES CITED

Cases (cont'd)	Page
Keegan v. University of Delaware, ... Del. ....., 349 A.2d 14, cert. denied 44 U. S. Law Week 3473	13, 21
Kunz v. New York (1951), 340 U.S. 290, 71 S. Ct. 312, 95 L. Ed. 267	15, 16, 17
Kusper v. Pontikes (1973), 414 U.S. 51, 94 S. Ct. 303, 38 L. Ed. 2d 260	35
Lawrence v. Buchmueller (1963), 243 N.Y.S. 2d 87	12, 13
Lemon v. Kurtzman (1971), 403 U.S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745	14, 17, 18, 19
Los Angeles v. Kirk (1905), 148 Cal. 385	29
McCollum v. Board of Education (1948), 333 U.S. 203, 68 S. Ct. 461, 92 L. Ed. 649	9, 10, 11, 13, 15, 16, 21
Meek v. Pittinger (1975), 421 U.S. 349, 95 S. Ct. 1753, 44 L. Ed. 2d 217	17, 18, 20
Moore v. Board of Education (1965), 212 N.E.2d 833	12
Niemotko v. Maryland (1951), 340 U.S. 268, 71 S. Ct. 325, 95 L. Ed. 267	15, 16, 17, 31
O'Hair v. Paine (1969), 312 F. Supp. 434, affirmed per curiam 432 F. 2d 66, cert. denied 401 U. S. 955	14
Police Department of Chicago v. Mosley (1972), 408 U.S. 92, 92 S.Ct. 2286, 33 L.Ed.2d 212	25, 26

TABLE OF AUTHORITIES CITED

Cases (cont'd)	Page
Reed v. Van Hoven (1965), 237 F. Supp. 48	11, 13, 21
Saia v. New York (1948), 334 U.S. 558, 61 S. Ct. 1148, 92 L. Ed. 1574	15, 16, 17
Schneider v. State (1939), 308 U.S. 147, 60 S. Ct. 146, 84 L. Ed. 155	27
Smith v. Smith (1975), 523 F.2d 121, cert. denied 44 U. S. Law Week 3416	17
Stacy v. Williams (1969), 306 F. Supp. 963	11, 21, 26, 27
Tinker v. Des Moines School District (1969), 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731	24, 25, 34, 35
Walz v. Tax Commission (1970), 397 U.S. 664, 90 S. Ct. 1409, 25 L. Ed. 2d 697	7, 8, 17
Wisconsin v. Yoder (1972), 406 U.S. 205, 92 S. Ct. 1526, 32 L. Ed. 2d 15	13
Wood v. Davison (1972), 351 F. Supp. 543	24
Wood v. Mt. Lebanon Township School District (1972), 342 F. Supp. 1293	12
Zorach v. Clauson (1951), 343 U.S. 306, 71 S. Ct. 689, 96 L. Ed. 954	10, 11, 12, 13, 16, 17, 18

Federal Communications Commission Case

In the Matter of Revision of Rules, etc. 54 F.C.C. 2d 941	32

TABLE OF AUTHORITIES CITED

Statutes (United States)	Page
28 U.S.C. § 1257(3)	3
United States Constitution, First Amendment	3, 4, 6, 7, 8, 9, 10, 12, 13, 15, 16 17, 19, 20, 22, 25, 32, 33, 34, 37
United States Constitution, Fourteenth Amendment	3, 6, 10, 12, 19, 20, 25, 26, 27, 31, 34, 35, 36

Statutes (California)

California Constitution, Art. IX, Sec. 8	28, 29
California Constitution, Art. XVI, Sec. 5	28, 30
California Administrative Code, Title 5, Sec. 303	5
California Education Code, Sec. 12101	5

Rules (California)

Rules of Court	
Rule 28(a)	2
Rule 45	2

Text

Louisell and Jackson, Religion, Theology and Public Higher Education (1962), 50 Cal. L. Rev. 751	29

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. .....

BRUCE JOHNSON, a minor, by Earl D. Johnson, *etc., et al.*,

Petitioners,

vs.

HUNTINGTON BEACH UNION HIGH SCHOOL DISTRICT, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI

INTRODUCTION

This is a petition for a writ of certiorari to review the judgment of the Court of Appeal of the State of California, Fourth District, Second Division, affirming the judgment of the Superior Court of the County of Orange, State of California.

JURISDICTION

The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. § 1257(3), the Court of Appeal being a court of last resort when the California Supreme Court denied hearing.

The decision of the Court of Appeal was filed on March 11, 1977 (Appendix "A"). A timely Petition for Rehearing was denied on March 30, 1977 (Appendix "B").

A Petition for Hearing before the California Supreme Court (a court of discretion) was filed on April 21, 1977, one day late under the Rules of Court, Rule 28(a), and based on said late filing the California Supreme Court refused the Petition for Hearing. On the same day the filing was refused, counsel for appellants submitted a request for relief from default under the provisions of Rules of Court, Rule 45. Said relief was denied on April 25, 1977 (Appendix "C").

On May 6, 1977, counsel for appellants filed a petition requesting the Supreme Court to grant a hearing on its own motion pursuant to Rule 28(a), with points and authorities in support thereof (Appendix "D"). Under the provisions of Rule 28(a), the Supreme Court has the authority to exercise jurisdiction and grant hearing on its own motion within 30 days after the decision of the appellate court becomes final. The Supreme Court ignored the request and refused to hear the matter on its own motion (Appendix "E").

Counsel for appellants having made a request that the matter be heard under rules of court which allow the Supreme Court of California to exercise jurisdiction by hearing the matter on its own motion, and the Supreme

Court having refused to exercise that jurisdiction within its power, the jurisdiction of this matter is preserved, in that all state remedies have been exhausted and the decision of the Court of Appeal is that of the court of last resort.

REASONS FOR GRANTING THE WRIT

The purpose for requesting the writ is so that this Court can resolve the question of what constitutional rights under the First and Fourteenth Amendments the students on high school and college campuses have to express and exercise their religious beliefs, as a voluntary organized group, during non-classroom time, while on campus.

The Court of Appeal's majority opinion (Appendix "A" pp. 1 - 18), in effect, denies the students the right to freely assemble as an organized group on campus, while other secular groups or clubs are allowed to meet on the same terms and conditions requested by the petitioners.

The Court of Appeal has based its determination on decisions of the United States Supreme Court made in numerous cases affecting the Establishment Clause of the First Amendment. The majority, if not all, of the prior decisions of the United States Supreme Court were based on cases arising from elementary and parochial schools, and none of the decisions speaks directly as to the rights of high school and college students.

High school and college students have much greater latitude and freedom as to the control of their academic

interests and desires, and the majority of these students have already formulated some religious belief or non-belief without any influence on the part of the academic community.

The very basic foundational question which underlies the entire petition is: *What degree of accommodation is allowable to these students under the Establishment Clause and the Fourteenth Amendment to express their religious beliefs on campus?* The decision of the California Court of Appeal has set forth no accommodation at all, and goes far beyond the true limits set by the First Amendment.

It is respectfully submitted that this writ is necessary to determine the limits of accommodation for these students, if accommodation exists at all.

STATEMENT OF FACTS

For many years the respondent Huntington Beach Union High School District ("District") has had a "student clubs" program in which the public high schools have granted "recognition" to individual student clubs, and those clubs so "recognized" were allowed the use of certain facilities of the schools, including the use of rooms or other space at the schools for club meetings, the use of posting facilities for notices of club activities, and the use of the school newspaper for publicizing club activities (Tr. p. 37, ll. 3 - 11). However, for most of these years the District did not extend these privileges to students who desired to participate in student clubs formed pursuant to the religious or spiritual interests of the students (Tr. p. 37, ll. 11 - 14).

On January 8, 1974, the District passed a resolution

the purpose of which was to allow students whose interests are religious most of the same privileges it granted to students whose interests are secular. Although "recognition" was still not granted the student religious clubs, they were allowed–like other student clubs–to meet voluntarily on the campus during the school day (Tr. p. 38, ll. 1 - 6). Among the times that the religious clubs, like other clubs, were to be allowed to meet was during their lunch hour (Tr. p. 56, para. 2). The Court may take judicial notice that for many high school aged students, school attendance is compulsory (Education Code § 12101 of the State of California), and that even for students over 16 years of age, once they arrive at school voluntarily the compulsion to stay there extends to the lunch hour (5 California Administrative Code § 303). It is obvious that the lunch hour is prime time for student clubs.

On June 25, 1974, the Orange County Counsel advised the trustees of the Huntington Beach Union High School District (who were, in their official capacity, defendants in this matter) that they could not extend these freedoms to religiously oriented student clubs (Tr. pp. 46 - 48). On that same day, the defendants (respondents herein) revoked the freedoms they had granted on January 8, 1974 (Tr. p. 38, ll. 13 - 23). In so doing, the respondents were acting under the advice of the Orange County Counsel, which advice they, in good faith, believed to be correct advice (Tr. p. 39, ll. 22 - 24).

It is the position of petitioners that as of June, 1974, all of the facts forming the substantial substantive issues of this cause were complete. However, in order to go through the formal steps necessary to the framing of a lawsuit which has to do with actual, justiciable rights, and in order to exhaust

all administrative remedies, the students, including petitioners, who desired to participate in a religiously oriented student club necessarily had to (and did) file a formal application for "recognition" (Tr. p. 38, ll. 24 - 32), have it formally rejected, and go through the various administrative remedies provided by the District. They did exhaust such administrative remedies (Tr. p. 39, ll. 1 - 4).

CONSTITUTIONAL PROVISIONS INVOLVED

First Amendment - United States Constitution:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the government for a redress of grievances."

Fourteenth Amendment - United States Constitution:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, withoud due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . . . "

ARGUMENT

I

In The Context Of An Ongoing Program Of Recognizing Student Organizations, And Granting Use Of School Facilities For Meeting And Communication Purposes, A School District Is Not Prohibited By The United States Constitution From Granting The Same Privileges To A Student Group With Religious Interests As Are Granted To Student Groups With Secular Interests.

This Court has said that tensions can exist between the Establishment Clause and the Free Exercise Clause which must be worked out on a case-by-case basis (*Walz v. Tax Commission* (1970), 397 U.S. 664, 668-69 [90 S. Ct. 1409, 25 L. Ed. 2d 697]). It is especially obvious in a case like this–where questions of freedom of expression, of association, and of the use of a public forum also involve religious activity and where denial of equality in the exercise of basic rights is based exclusively upon considerations of religion–that tensions can exist between the Establishment Clause and constitutional safeguards other than the Free Exercise Clause, which (*if* the Establishment Clause is *really* involved) must be worked out on the basis of weighing the relative importance of all the constitutional considerations involved.

A. The Establishment Clause does not purport to forbid the granting of recognition and/or facilities use to these students.

In a brief concurring opinion in *Healy v. James* (1972), 408 U.S. 169, 203 [92 S. Ct. 2338, 33 L. Ed. 2d 266], Mr. Justice Rehnquist wrote: "Prior cases dealing with First Amendment rights are not fungible goods. . . . " Petitioners believe that this observation is especially appropriate when one has in view the two Religion Clauses of the First Amendment. Concerning these two particular clauses, in *Walz v. Tax Commission, supra,* 397 U.S. 664, 668, this Court emphasized the danger in assuming that broad language is transferable from one class of cases to another class of cases:

> "The considerable internal inconsistency in the opinions of the Court derives from what, in retrospect, may have been too sweeping utterances on aspects of these clauses that seemed clear in relation to particular cases but have limited meaning as general principles."

Petitioners submit that the statement just quoted was given to alert parties, counsel and judges that specific application of general statements made in connection with one group of cases (*e.g.*, those involving the expenditure of thousands or millions of dollars of tax money to aid institutional religion) will often vary from the application of those same statements when made in cases whose context is entirely different (*e.g.*, those involving the accommodation by a state-supported school of the religious interests of its students).

The fact is that precisely four definitive opinions—no more, no less—have been handed down by the United States Supreme Court in cases having to do with religious activities in the milieu of the public school system. In three of these

opinions the Court ruled that public schools cannot *sponsor* religious activities. In the fourth it held that there is no constitutional prohibition against public school *accommodation* of the religious interests of the students. It is important at the outset to state briefly the facts of each case, because these four opinions are our principal guidelines.

In *McCollum v. Board of Education* (1948), 333 U.S. 203 [68 S. Ct. 461, 92 L. Ed. 649], a school board affirmatively required 30-minute religious instruction periods to be held each week in the classrooms during the regular instruction time. It was held that this was an establishment of religion.

In *Engel v. Vitale* (1962), 370 U.S. 421 [82 S. Ct. 1261, 8 L. Ed. 2d 601], the Board of Education affirmatively required the repetition of a brief, denominationally neutral prayer which was composed by the state. It was held that the imposition of this ceremony (which was voluntary as to attendance but had to be held) is violative of the Establishment Clause.

In *Abington School District v. Schempp* (1963), 374 U.S. 203 [83 S. Ct. 1560, 10 L. Ed. 2d 844], the state required daily reading in class from the Bible followed by the recitation of the Lord's Prayer. This also was held to violate the Establishment Clause.

In each and every one of these cases the religious activities were curricular in nature. In each it appeared to the school children that the state stood behind the ideological content of the doctrinal teaching or exercise. In each the government was actively *sponsoring* religion—forbidden by the First Amendment and made mandatory

upon the states by the Due Process Clause.

Under many circumstances the state may *accommodate* an activity which it could not sponsor. The fourth United States Supreme Court decision is illustrative of this principle. That case is *Zorach v. Clauson* (1951), 343 U.S. 306 [71 S. Ct. 689, 96 L. Ed. 954], in which the arrangement was like that in *McCollum* except the weekly religious instruction was not held in the classrooms and the instructors were not under the control of the superintendent. It was held that this was *not* an Establishment of Religion.

The circumstances that *Zorach* approved off-campus activities similar to those which *McCollum* had forbidden in an on-campus situation has given rise to the simplistic notion that the only operative fact under the Establishment Clause is the place of the activity. However, Mr. Justice Brennan wrote a concurring opinion in *Schempp* in which he exploded this concept, pointing out (at p. 262 of 374 U.S.) that the "deeper difference was that the *McCollum* program placed the religious instructor in the public school classroom in precisely the position of authority held by the regular teachers of secular subjects while the *Zorach* program did not." He continued (at p. 263):

> "To be sure, a religious teacher presumably commands substantial respect and merits attention to his own right. But the Constitution does not permit that prestige and capacity for influence to be augmented by investiture of all the symbols of authority at the command of the lay teacher for the enhancement of secular instruction."

Justice Brennan is not alone in his analysis. In a concurring opinion in *McCollum*, four justices stated (at p. 230 of 333 U.S.) that the vice in the Champaign, Illinois, program was that:

> "The momentum of the whole school atmosphere and school planning is presumably put behind religious instruction, as given in Champaign, precisely in order to secure for the religious instruction such momentum and planning."

In the majority opinion in *Zorach* the Court distinguished *McCollum* on the ground that in the latter case "the classrooms were used for religious instruction and *the force of the public school was used to promote that instruction.*" (343 U.S. at p. 315; emphasis added.)

The *Zorach* Court was using the word "classroom" in the sense of a teaching unit, not in the sense of a geographic location. An emphasis on mere geography cannot be squared with the emphasis upon "prestige and capacity for influence" in Justice Brennan's concurrence in *Schempp*, or with the emphasis upon "the force of the public school" as the ultimate factor in *Zorach's* characterization of *McCollum*. (In this connection, it should be noted that the proposed Charter of the student Bible Study Club sought by petitioners herein affirmatively required that both before and after each of its meetings an announcement be made that the views therein expressed were not those of the school [Tr. p. 51, Article 6].)

The results of the post-*Schempp* decisions of state courts and lower federal courts also demonstrate the lack of significance of mere geography. In *Reed v. Van Hoven* (1965), 237 F. Supp. 48, 53, a federal district court upheld a truly voluntary on-campus prayer program which did not appear to have the imprimatur of the school. In *Stacy v. Williams* (1969), 306 F. Supp. 963, 975-76, a three-judge federal court held

invalid (on Equal Protection grounds) a University of Mississippi regulation which singled out and forbade on-campus religious meetings, pointing out (at p. 974) that the University's approval of any activity can easily be negated by merely announcing at the time that the University did not necessarily subscribe to its content. In *Lawrence v. Buchmueller* (1963), 243 N.Y.S. 2d 87, a New York court found no Establishment Clause violation in a creche being allowed on school property under circumstances where (pp. 90 - 91) "[u]nlike *Engel* . . . or . . . *Schempp* . . . which concerned active involvement by Government in religious exercises, the present case constitutes, at most, a passive accommodation to religion." In *Wood v. Mt Lebanon Township School District* (1972), 342 F. Supp. 1293, 1295, a federal district court found no Establishment Clause violation in allowing invocational and benedictional prayers to be said in on-campus graduation ceremonies where there was no "semblance of governmental establishment or even condonation."

These cases demonstrate that lack of ostensible government support will obviate any Establishment difficulties arising purely from geographical considerations. The other side of the coin is demonstrated in *Moore v. Board of Education* (1965), 212 N.E.2d 833, 843, in which an Ohio court would not permit even a *Zorach*-type of released time program off the campus where the unusual circumstances were such that "[i]n the eyes of the pupils" it appeared that the school was teaching the religious lessons. It is thus apparent that in the setting of the public school system ideological sponsorship (actual or apparent), rather

than toleration-on-school-premises, is the essence of Establishmentarianism.

Accommodation of students' religious interests is a permissible governmental activity which was held to be salutary in *Zorach, supra,* at p. 314 of 343 U.S.; which was applied generally to the field of relations between schools and pupils in *Wisconsin v. Yoder* (1972), 406 U.S. 205, 234, at footnote 22 [92 S. Ct. 1526, 32 L. Ed. 2d 15]; which was applied specifically to school premises in *Reed v. Van Hoven, supra,* at p. 53 of 237 F. Supp., and in *Lawrence v. Buchmueller, supra,* at p. 90 of 243 N.Y.S. 2d; and which was sharply distinguished from "active involvement" with religious matters in the last-mentioned decision.

Very recently the Supreme Court of Delaware ruled that the Establishment Clause would not be violated by a state university allowing regular student worship services in the commons room of its dormitories.

> "The Establishment cases decided by the United States Supreme Court indicate that neutrality is the safe harbor in which to avoid First Amendment violations: neutral 'accommodation' of religion is permitted [citations including the *Zorach* case], while 'promotion' and 'advancement' are not [citations including the *McCollum* case]."
>
> *Keegan v. University of Delaware,* ..... Del. ..... , 349 A.2d 14, 16, *cert. denied,* 44 U.S. Law Week 3473.

During the past five years the United States Supreme Court has developed a tripartite test to determine whether or not the Establishment Clause has been violated by a statute

(or, as it is herein claimed, by a nonstatutory governmental program).

> "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.' "
>
> *Lemon v. Kurtzman* (1971), 403 U.S. 602, 612-613 [91 S. Ct. 2105, 29 L. Ed. 2d 745].

The trial court conceded that "the legislative purpose–or, as in our case, the School Board action in permitting the club–would be secular in nature. It appears that the District policy to permit school clubs to be formed has a general secular purpose." (Tr. p. 72, beginning at the ninth line.) Naturally, petitioners agree with this analysis. To assume that the purpose of allowing a Bible Study Club, along with the others allowed under the District's ongoing program of accommodating all kinds of student organizations, is a religious one would be to misunderstand whose "purpose" is under consideration. In *O'Hair v. Paine* (1969), 312 F. Supp. 434 [*affirmed per curiam* 432 F. 2d 66, *cert. denied* 401 U.S. 955], the plaintiff asked a federal court to restrain NASA (a government agency) from suffering the astronauts to broadcast religious "ceremonies" of the type which were broadcast during the Apollo 8 and Apollo 11 flights. But the court held against her, saying, at page 437: "The purpose of NASA is obvious, it is solely to accommodate the astronauts." NASA had a secular purpose (to put a man on the moon) and in the carrying out of that secular purpose NASA found it reasonable to make this accommodation. The respondent District also has a secular purpose (to permit the interchange of ideas among students by

means of student clubs), which can include the accommodation of the religious interests of its students without involving the District in religious purposes.

Proceeding to the next test, the trial court drew from the stipulated facts the erroneous legal conclusion that "the primary effect in permitting this club a charter under Board Policy No. 5144 and Staff Rule No. 5144 would be to advance or inhibit religion."

It is clear that merely allowing a religious group to have a religious meeting on a piece of public property (which has been found by the officials in charge to be appropriate for meetings generally) is not an "advancement" of religion within the meaning of the decisions interpreting the Establishment Clause. Quite to the contrary, this Court has, on at least three occasions (*Saia v. New York* (1948), 334 U.S. 558 [61 S. Ct. 1148, 92 L. Ed. 1574]; *Kunz v. New York* (1951), 340 U.S. 290 [71 S. Ct. 312, 95 L. Ed. 267]; and *Niemotko v. Maryland* (1951), 340 U.S. 268 [71 S. Ct. 325, 95 L. Ed. 267]), held that under such circumstances the state may allow religious meetings in its public parks. If the Establishment Clause was considered by this Honorable Court in these cases, then they must be taken to hold that Establishment Clause "advancement of religion" does not arise from the mere use of public property for religious meetings. In at least two of these decisions the Establishment Clause issue was considered. The point was raised in *Kunz v. New York* by the dissenting opinion of Mr. Justice Jackson, who urged that *Illinois ex rel. McCollum v. Board of Education, supra,* 333 U.S. 203, had held that "the Constitution will not suffer tax-supported property to be used to propagate religion" (see 340 U.S. at p. 311, note 10). The Court had been confronted

with this argument in this context three years before *Kunz;* in *Saia,* Justice Jackson had also dissented on the basis that "only a few weeks ago [in *McCollum*] we held that the Constitution prohibits a state or municipality from using tax-supported property 'to aid religious groups to spread their faith.' " (See 334 U.S. at p. 569.) However, this rationale was considered and rejected by this Honorable Court in *Kunz* and *Saia* and, inasmuch as *Niemotko* was decided the same day as *Kunz*, presumably also in *Niemotko*. While public parks are more obviously a natural place for meetings than an otherwise unused school room, it is equally obvious that the District itself has determined (as have probably more than 95% of the country's high school districts) that its otherwise unused school rooms are an appropriate place to be used by groups of students with common interests as places in which to have meetings and exchange ideas. Having created a forum for such purposes, the District does not "advance religion" impermissibly by accommodating the religious interests of groups of its students in the unused-school-room forum any more than would a park commission "advance religion" impermissibly by accommodating the religious interests of groups of citizens in the unused-portion-of-a-city-park forum.

One cannot intelligently ignore the analysis that in *all* of the three United States Supreme Court decisions (*McCollum, Engel* and *Schempp*) in which religious activities in a public school setting were held to violate the Establishment Clause, the school board had decreed that these religious activities *must be held,* whereas in the fourth decision (*Zorach*) the school board *only allowed* the religious activity to exist within the public school students' permitted activities, and the Court

held this did not violate the Establishment Clause.

If religion is not advanced (in the constitutional sense) by students being allowed to devotionally study the Bible during curricular hours in a *Zorach*-type program—and that is what *Zorach* held (according to *Smith v. Smith* (1975), 523 F.2d 121, 125, *cert. denied,* 44 U. S. Law Week 3416) —then it is difficult to understand how religion is advanced (in the constitutional sense) by students being allowed to devotionally study the Bible on their own free time in an otherwise unused school room, unless one takes the position that the only operative fact is that government property is being used—a position which is inconsistent with *Saia, Kunz,* and *Niemotko,* and the principle without which those cases could not have been decided as they were: that there is Establishment in sponsorship but not in neutral accommodation.

The third part of the tripartite test forbids the fostering of excessive entanglement between government and religion. This is a concept conceived in *Walz v. Tax Commission, supra,* 397 U.S. 664, 674, and born in *Lemon v. Kurtzman, supra,* 403 U.S. 602, 612-613, scarcely six years ago. The only circumstance in which it has ever been applied by the Court is that in which a state statute with an ostensibly secular purpose has earmarked immense amounts of tax funds for the use of church-related schools and, in order to be sure that the funds are not used in the religious activities of the school, the statute has provided for continuing and massive government surveillance to be sure that state funds are not being used for religious purposes. (*Lemon v. Kurtzman, supra; Committee for Public Education v. Nyquist* (1973), 413 U.S. 756 [93 S. Ct. 2955, 37 L. Ed. 2d 948]; *Meek v.*

Pittinger (1975), 421 U.S. 349 [95 S. Ct. 1753, 44 L. Ed. 2d 217].)

There is no occasion for religiously-motivated surveillance in the case *sub judice*. The Orange County Counsel has pointed to cases which hold that under general tort laws a school district has the duty to have an adult present at student activities to minimize the chance that the students will be physically injured by horseplay or otherwise (Tr. p. 46, last paragraph), and he reasoned from these cases that the presence of a teacher-monitor at the meetings of the Bible Study Club would foster an impermissible surveillance (Tr. p. 47, paragraph 4). This line of reasoning ignored the fact that the surveillance forbidden by the third Establishment Clause test as expounded in *Lemon* and *Nyquist* is *religion*-related surveillance (in that its purpose is to detect religious activity), whereas the "surveillance" under consideration is safety-related. Impermissible entanglement did not arise out of the truancy-related surveillance provisions of the *Zorach* released time program. Niether does impermissible entanglement arise from safety-related surveillance requirements.

There are decisions of the United States Supreme Court (notably *Nyquist* and *Lemon*) which state that a purpose of the Establishment Clause was to avoid political division along religious lines. It must be repeated that in those cases the issue has been whether states can give away millions of dollars to church-related schools, not whether states can give the same privilege to groups of students who are interested in spiritual matters as are routinely given to groups of students who are interested in secular matters. It was one thing for the Court to consider political divisiveness when invalidating massive

grants made directly (*Lemon*) or not-too-indirectly (*Nyquist*) to institutional religion. It would be quite another thing for the Court to say that granting students the same privilege to meet and discuss religious matters as is granted to other students to meet and discuss secular matters has a potential for impermissible political divisiveness. The decisions relied upon by the courts below had to do with divisiveness arising out of programs of gigantic favoritism towards religious institutions–not, as here, with fancied divisiveness arising out of a program of equality which extends to the spiritually inclined as well as to those whose interests are secular. This Court has never held or even hinted that religious speech or gatherings should be curtailed because to allow such expression or association might divide the community. To the contrary, the Court has many times said that "a function of free speech under our system of government is to invite dispute" (*e.g.*, *Edwards v. South Carolina* (1963), 372 U.S. 229, 237 [83 S. Ct. 680, 9 L. Ed. 2d 697]).

B. Assuming that the Establishment Clause is really involved in the issue set forth hereunder, the value of the rights sought to be protected by the Establishment Clause are outweighed by the value of other First and Fourteenth Amendment rights.

It is the contention of petitioners that in an ongoing program of a public school district which singles out student groups with religious interests and (solely on the basis of those religious interests) denies those groups recognition, the school system has denied the discriminated-against students

a wide range of their constitutional rights embraced by the First and Fourteenth Amendments.

Petitioners have hereinbefore replied that the Establishment Clause is not involved in the context of the case *sub judice,* and they now reply that assuming, *arguendo,* the existence of some relevance of the Establishment Clause to the case, the law is not such that the Establishment Clause values automatically override every other and all other constitutional values.

In *Meek v. Pittinger, supra,* 421 U.S. 349, 359, the most recent of the Supreme Court's Establishment Clause decisions, the Court states that its tripartite tests–

> "serve only as guidelines with which to identify instances in which the objectives of the Establishment Clause have been impaired. [Citation.] Primary among the evils against which the Establishment Clause protects 'have been "sponsorship, financial support, and active involvement of the sovereign in religious activities" [Citations]' ."

These three objectives of the Establishment Clause–prevention of government sponsorship of religion; prevention of government financial support of religion; and prevention of the sovereign becoming involved in religious activities–should be examined to show the maximum involvement of Establishment Clause *values* in this case when one has accepted, *arguendo,* the premise that the Establishment Clause is relevant:

1. There is absolutely no sponsorship involved. The students do not ask to be sponsored, they ask only to be tolerated. They ask to be tolerated to the extent of being allowed to meet during the lunch hour–when they are free

in every sense except being able to leave the campus or being able to meet to study the Bible–like the other students are allowed to meet. That this *can* be done without sponsorship is conclusively proved by the fact that it was done without sponsorship between January 8, 1974 and June 25, 1974 (Tr. p. 38, ll. 1 - 12; p. 56).

2. The principal "financial support" to religion is allowing these young people to use an otherwise unused room in the school for their religious discussion and study.[1] It is not unlikely that there would be an infinitesimal further increment (*e.g.,* for electricity) that a fastidious Disestablishmentarian would classify as "financial support." These are the things to be weighed on the constitutional scales against counterweights such as deprivation of freedom of association. The precise point which petitioners urge is that allowing religious meetings to happen on otherwise unused governmental park property was not the kind of "financial support" which would induce the United States Supreme Court to override the claims of Messrs. Saia, Kunz, and Niemotko without weighing their fundamental rights. Nor did the *de minimis* increment involving lighting expense deter the courts which decided *Keegan v. University of Delaware, supra,* 349 A.2d 14; *Reed v. Van Hoven, supra,* 237 F. Supp. 48, and *Stacy v. Williams, supra,* 306 F. Supp. 963, from considering constitutional rights as well as electric bills.

3. If there is any active involvement in religious activities involved in this situation, the involvement is

---

[1]Somewhat in the manner suggested by Jefferson when he was Rector of the state-operated University of Virginia and approved by Madison, who was at that time a member of its Board of Visitors (see the opinion of Justice Reed, dissenting in *McCollum v. Board of Education, supra,* 333 U.S. 203, 245 ff.)

insignificant and involves the last paragraph. Announcements will be made that the views expressed at the meetings are not necessarily those of the school. If a faculty member must be present at the meetings, he or she will be involved in safety activity–not religious activity.

(a) Traditional First Amendment rights of free expression and assembly.

This Honorable Court has specifically, recently and unanimously ruled that the limitation or denial of the freedom of speech or assembly by a state university on the basis of a subject matter which is neither slanderous nor obscene is violative of the students' First Amendment rights. In *Healy v. James* (1972), 408 U.S. 169 [92 S. Ct. 2338, 33 L. Ed. 2d 266], a group of student activists (*i.e.*, the Students for a Democratic Society) at a Connecticut state college sought recognition as a student organization. The president of the college denied them recognition. The practical consequence of this action was summarized by the Court as follows (408 U.S. at p. 176):

> "Denial of official recognition posed serious problems for the organization's existence and growth. Its members were deprived of the opportunity to place announcements regarding meetings, rallies or other activities in the student newspaper; they were precluded from using various campus bulletin boards; and–most importantly–nonrecognition barred them from using campus facilities for holding meetings."

The Court held this to be a prior restraint of the First Amendment right of freedom of association, "denying to petitioners' organization the range of associational activities described above" (408 U.S. at p. 184). The language with which the Court described the constitutional violation bears repeating:

> "Among the rights protected by the First Amendment is the right of individuals to associate to further their personal beliefs. While the freedom of association is not explicitly set out in the Amendment, it has long been held to be implicit in the freedoms of speech, assembly, and petition. There can be no doubt that denial of official recognition, without justification, to college organizations burdens or abridges that associational right. The primary impediment to free association flowing from nonrecognition is the denial of use of campus facilities for meetings and other appropriate purposes." (408 U.S. at p. 181.)

There are many other decisions protecting student groups from non-recognition or facility denial because of their proposed activities, of which a few examples follow:

Hudson v. Harris (1973), 478 F.2d 244, 246:

> "The test to be applied is whether such an organization would substantially and materially interfere with the discipline necessary to operate the college."

American Civil Liberties Union v. Radford College (1970), 315 F. Supp. 893, 896:

> " . . . [O]nce a public school makes an activity available to its students, faculty, or even the general

public, it must operate the activity in accord with First Amendment principles."

Gay Students Organization v. Bonner (1974), 509 F.2d 652, 660:

" . . . [I]t is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, *religious* or cultural matters." (Emphasis added.)

Wood v. Davison (1972), 351 F. Supp. 543, 546:

"It is now clear that constitutional restraints on authorities apply on campuses of state supported educational institutions with fully as much sanction as public streets and in public parks."

Although the last cited case refers to "state supported educational institutions," which certainly includes high schools, the cases hereinabove relied on, beginning with *Healy v. James,* all took place at the college level. It remains to be shown that the same rules apply at the high school level.

Tinker v. Des Moines School District (1969), 393 U.S. 503 [89 S. Ct. 733, 21 L. Ed. 2d 731], is the fountainhead of constitutional law as it pertains to public high school students. That decision made a number of relevant observations, including:

"The principal use to which the schools are dedicated is to accommodate students during prescribed hours for certain types of activities. *Among those activities is personal intercommunication among the students.*" (P. 512; emphasis added.)

"Students in school as well as out of school are

'persons' under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State." (P. 511.)

"Clearly, the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible." (P. 511.)

(b) The right to the free use of a public forum, a modern penumbral right of constitutional dimension.

In 1972 this Court announced a constitutional right fashioned from First Amendment freedoms and the Equal Protection Clause, which has come to be known as the "freedom of a public forum." This unanimous decision (*Police Department of Chicago v. Mosley,* 408 U.S. 92 [92 S. Ct. 2286, 33 L. Ed. 2d 212]) involved a city ordinance which forbade picketing within 150 feet of a public school building except for picketing in connection with labor disputes. The defendant was convicted of carrying picket signs which accused a public school of racist policies. Because the ordinance discriminated against non-labor dispute picketing on the basis of subject matter, the Court invalidated the ordinance in these words (at pp. 96 - 97):

" . . . [U]nder the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose

views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities . . . Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say.

" . . . In *Niemotko v. Maryland,* 340 U.S. 268 (1951), a group of Jehovah's Witnesses were denied a permit to use a city park for Bible talks, although other political and religious groups had been allowed to put the park to analogous uses . . . [T]his Court held that the permit refusal violated '[t]he right to equal protection of the laws, in the exercise of those freedoms of speech and religion protected by the First and Fourteenth Amendments.' "

(c) Equal protection of the laws.

Although the constitutional right to freedom of a public forum has equal protection overtones, there are also cases which reach the same conclusion entirely upon pure Equal Protection Clause principles. In one of them a three-judge federal district court reviewed all the rules of the University of Mississippi which bore on the subject of outside speakers on campus (*Stacy v. Willaims* (1969), *supra,* 306 F. Supp. 963). Among the rules considered by the court, one had to do with religion and provided that facilities of the university "shall not be made available for public religious meetings or gatherings

to off-campus persons or groups of persons." The court invalidated the regulation, saying:

> "[Because] this regulation can reasonably be construed to mean that no student religious group may invite outside speakers on religious topics, which prohibition would conflict with the Equal Protection Clause, it must be rejected . . . . " (306 F. Supp. at pp. 975 - 976.)

Stacy v. Williams shows that "religion" is not a reasonable classification and that a state may not choose the broad classification of "religion" for exclusion in its public educational institutions and justify the classification on Equal Protection principles. To the contrary, "freedoms of speech and of press, of assembly, and of worship may not be infringed" on the "slender grounds" that the Fourteenth Amendment has been complied with in a general way (*Danskin v. San Diego Unified School Dist.*, 28 Cal. 2d 536, 550).

> "[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."
>
> *Schneider v. State* (1939), 308 U.S. 147, 163 [60 S. Ct. 146, 84 L. Ed. 155].

The practical realities are that if students are to communicate with students on *any* subject, they must do so where students come together: *at school!*

On one side of the scale is an empty school room. Being empty, it would hardly move the scale even if it were being balanced against nothing, especially since there is no governmental purpose other than to be fair, grant equality and give

an opportunity for student intercommunication. On the students' side of the scale there is to be weighed almost every one of the freedoms that are most valued by our nation's fundamental laws.

II

In The Context Of An Ongoing Program Of Recognizing Student Organizations And Granting Use Of School Facilities For Meeting And Communication Purposes, A School District Is Not Prohibited By The California Constitution From Granting The Same Privileges To A Student Group With Religious Interests As Are Granted To Student Groups With Secular Interests.

Two portions of the California Constitution were claimed by the Orange County Counsel to prohibit the Bible Study Club activities proposed by petitioners and their fellow students. These portions are:

> " . . . nor shall any sectarian or denominational doctrine be taught, or instruction thereon be permitted, directly or indirectly, in any of the common schools of this State."
>
> Article IX, Section 8.

> "Neither the Legislature, nor any county [or] . . . school district . . . shall ever . . . grant anything to or in aid of any religious sect, church, creed, or sectarian purpose. . . . "
>
> Article XVI, Section 5.

A. Article IX, Section 8, does not forbid the activities proposed by petitioners.

This particular state constitutional section employs the term "common schools." This term was chosen by the drafters of Article IX as a special term inclusive only of primary and grammar schools (*Los Angeles County v. Kirk* (1905), 148 Cal. 385, 389; Louisell and Jackson, *Religion, Theology and Public Higher Education* (1962), 50 Cal. L. Rev. 751, 769), and thus, by its own terms, this section is not applicable to high schools.

Even if the section applied to high schools, it applies only to "instruction" and things that are "taught." Without a very strained construction, these terms cannot apply to the intercommunication of ideas among students. And such intercommunication of ideas among students is natural in the high school setting. The obvious meaning of teaching and instruction in this constitutional section is a purely curricular one. There is no intention shown in the language of the section to prevent discussion among students about God. The section intends to restrict the permissible activities of the sovereign, not the permissible activities of individuals.

> " . . . there was no thought whatsoever in the minds of the framers of that document in opposition to or of hostility to religion as such. They proposed to insure separation of church and state and to provide that the power and authority of the state should never be devoted to the advancement of any particular sect or denomination."
>
> *Gordon v. Board of Education* (1947), 78 Cal. App. 2d 464, 472 - 473.

To single out religion as the only subject which may not be voluntarily and extracurricularly examined in the environment of the public schools is most certainly an act *hostile to religion.* Consequently, this becomes constitutionally impermissible.

B. Article XVI, Section 5, does not forbid the activities proposed by petitioners.

Prevention of active advancement by the sovereign of "any particular sect or denomination" was the main purpose of the California constitutional convention in setting forth "separation" provisions. Such provisions are clearly set out in the aforementioned case of *Gordon v. Board of Education.*

In contrast to the separation provisions, a reviewing court must address itself to the scope of involvement. The courts have consistently relied upon a theory of degree and "substantial advancement" of religion (*California Educational Facilities Authority v. Priest* (1974), 12 Cal. 3d 593). The act of the school authorities in granting equality to these students will not "substantially" advance religion. Neither would the granting of such equality give any aid whatsoever to a religious institution, and it is state aid to sects and to the sectarian to which Article XVI, Section 5, of the California Constitution addresses itself.

The Bible Study Club does not request the support of the school but, rather, a mere forum in which to exercise its constitutionally guaranteed rights. This type of activity is not restricted or forbidden by Article XVI, Section 5.

III

In The Context Of An Ongoing Program Of Recognizing Student Organizations And Granting Use Of School Facilities For Meeting And Communication Purposes, If Any Provision Of The California Law (Including The California Constitution) Purports To Prohibit A School District From Granting The Same Privileges To A Student Group With Religious Interests As Are Granted To Student Groups With Secular Interests, Such Provision Of California Law Violates The United States Constitution And Is Invalid.

The construction of the California Constitution as set forth by the Orange County Counsel must result in two sections of the California Constitution being in violation of the United States Constitution. The state cannot deny equal rights to the Bible Study Club simply because of its motive. This, in simple terms, is a violation of equality under the Equal Protection Clause of the Fourteenth Amendment.

The school district cannot grant to students of secular clubs the rights of expression and association, and yet deny those same rights to students of religious clubs.

Allowing the students to use a school room in which to meet and talk does not have the effect of directly or immediately or substantially advancing religion, any more than allowing such activities to take place in a public park (*Niemotko v. Maryland, supra,* 340 U.S. 268).

It is perfectly competent for the California Constitution and laws to "separate church and state" by limiting the permissible activities of the *sovereign.* It is not competent for that same Constitution or laws to limit otherwise permissible

and constitutionally protected activities of the *people* by singling out a subject matter as to which those activities are denied.

In light of this delineation, the California Constitution cannot set out religion as a suspect activity and deny certain rights to groups on that basis alone.

A. Such a provision would violate the Establishment Clause.

Not only may legislation not have the purpose or primary effect of advancing religion, it equally may not have the purpose or primary effect of *inhibiting* religion (*Abington School District v. Schempp, supra,* 374 U.S. 203, 222; *Committee for Public Education v. Nyquist, supra,* 413 U.S. 756, 773). There is not a great deal of legislation having the purpose or effect of inhibiting religion, so the rule is rarely litigated. However, the Federal Communications Commission was recently asked to place a "freeze" on all applications by religious groups seeking educational FM and TV channels. The Commission denied the petition on Establishment Clause grounds, saying:

> "As a government agency, the Commission is enjoined by the First Amendment to observe a stance of neutrality toward religion, acting neither to promote nor to inhibit religion."
>
> *In the Matter of Revision of Rules, etc.,*
> 54 F.C.C. 2d 941, 949.

Equally, the respondent school district is enjoined by the Establishment Clause to observe a stance of neutrality. It is the route of neutrality which the petitioners believe is intended by the California constitutional provisions. "Neutrality" means that the fact that a student group's interest is

religious neither is a reason for granting them recognition nor denying them recognition. A construction which requires denial of recognition simply because of a religious interest violates the Establishment Clause.

B. Such a provision would violate the Free Exercise of Religion Clause.

The two "religion" clauses of the First Amendment, under the circumstances now before the Court, do prevent the State of California–whether through its Constitution or otherwise–from forbidding in its schools the freedom of communication of religious thought–a form of freedom of religion–on the sole ground that it is religious in nature. The rule applied by the United States Supreme Court in Free Exercise situations is the same as that just described for Establishment Clause situations:

> " . . . [I]f the purpose or effect of a law is to impede the observance of one or all religions . . . that law is constitutionally invalid, even though the burden may be characterized as being only indirect."
>
> *Braunfeld v. Brown* (1961), 366 U.S. 599, 607 [81 S. Ct. 1144, 6 L. Ed. 2d 563].

That is precisely the construction of the California Constitution urged by those who would deny recognition to a student Bible Study Club on the sole ground of its religious nature. Their construction extends the effect of the California provisions beyond the control of what the sovereign can do, to the ultimate control of otherwise privileged activities of the *people,* and forbids the observance of religious communication. A construction which denies recognition to this Bible Study

Club violates the Free Exercise of Religion Clause.

C. Such a provision would violate the Freedom of Expression and Freedom of Association Clauses, the right to Free Use of a Public Forum, and the Equal Protection Clause.

Any case involving a fundamental freedom, as the case at bar, requires a balancing of the interests. In the "weighing" process between First Amendment rights and state laws which deny those rights, the scales do not start out evenly: the state must show a "compelling interest" to justify its denial of such fundamental rights.

> "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its validity."
>
> *Freedman v. Maryland* (1965), 380 U.S. 557 [85 S. Ct. 734, 13 L. Ed. 2d 649].

In broadening the quantitative definition of the state's burden, *Tinker v. Des Moines School District, supra,* 393 U.S. 503, offers a qualitative dimension particularly applicable to public high schools. The Court therein stated that when there is no finding and no state showing that exercise of fundamental constitutional rights would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school," the prohibition of the exercise of those rights cannot be countenanced. There is no indication of such interference in the present case. But, beyond this, there is no indication that the California constitutional provisions have any relationship to the smooth running of the

school system.

Education, or the school experience, is much more than merely "that which the State chooses to communicate" (*Tinker, supra*). Any possible growth or advancement is stunted by such a limited scope. This, in and of itself, defeats the purpose of the educational experience –open communication.

If California can forbid its students to have organized discussions of religion in their free time, it can similarly forbid them to discuss the moral condition of government, the relationship of war in its various forms to compassion for humanity, or even the quality of food in the cafeteria. Schools will then no longer be places of freedom but places where freedom is taught to students who experientially know that it does not exist.

The means chosen by California to protect its "compelling state interest" must take the form which provides the least interference with the students' fundamental liberties. Even though a legitimate state interest is identifiable, a "significant encroachment upon associational freedom cannot be justified . . . " (*Kusper v. Pontikes* (1973), 414 U.S. 51, 58 - 59 [94 S. Ct. 303, 38 L. Ed. 2d 260]). Such means as chosen by the state may not "unnecessarily restrict [a] constitutionally protected liberty" (*Kusper, supra*).

Attention must be given to Equal Protection in this situation. The classification involved in this case is not reasonable. Merely because the treatment is the same with respect to all religious groups does not cleanse the classification.

> "Although an individual's right to equal protection does not deny the power to treat different classes

> of persons in different ways; it denies the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the statute."
>
> *Johnson v. Robinson* (1974), 415 U.S. 361, 374 [94 S. Ct. 1160, 39 L. Ed. 2d 389].

The objective of the student club program is to encourage the intercommunication of ideas among students on subjects of interest to the students. Religion is a subject of interest to many students. To remove it as a permissible subject of student intercommunication is to grant different treatment on the basis of criteria wholly unrelated to the objective of the student clubs program.

D. Board Rule 5144 and Staff Rule 5144 violate the Due Process Clause.[2]

The utter meaninglessness of these two rules make them void both for vagueness and overbreadth. If it is the contention of the respondent District that instructions subsequent to June 24, 1974, have made it clear that only religious clubs are not to be "sponsored" (and thus are to be denied existence), then the unfettered vagueness has been turned into outright censorship. Either way, due process is denied. Additionally, because of the utter lack of standards by which the schools should or should not grant "recognition" (*i.e.*, existence), the entire system is in itself an unconstitutional licensing

---

[2]Board Rule 5144 is set forth in footnote 2 of the opinion of the California Court of Appeal (Appendix p. 2), and Staff Rule 5144 is set forth in footnote 3 thereof (Appendix pp. 2 and 3).

system. (*Jones v. Board of Regents* (1970), 436 F.2d 618, 621.)

CONCLUSION

Perhaps the solution of the whole Establishment Clause issue lies in the fact that before there can be an Establishment Clause violation there must be some "state action"–a term used in several constitutional contexts.

The first decision to hold that the Establishment Clause is binding upon the states was *Everson v. Board of Education* (1947), 330 U.S. 1 [67 S. Ct. 504, 91 L. Ed. 711]. In *Everson* a New Jersey taxpayer attacked a New Jersey statute which allowed school districts to reimburse the parents of all children within the district (including those whose children attended parochial schools– for their expenditures in sending the children to school on buses operated by the public transportation system. After holding the Establishment Clause to be applicable, the Court upheld the New Jersey statute, saying (at p. 18):

> "The Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them."

It is urged that many fundamental constitutional rights are being violated under the misapplication of the Establishment Clause, and the respondent District has failed to take into account the value of the constitutional rights of these students for no higher a reward than that an empty school room (not "classroom") can be kept empty.

For the foregoing reasons, petitioners respectfully pray that the issues herein raised be given consideration by this Honorable Court and that this petition for writ of certiorari be granted.

Respectfully submitted,

THOMAS M. WHALING

Attorney for Petitioners.

Of Counsel:
KENNETH A. ROBERTS

INDEX TO APPENDIXES

Appendix		Page
"A"	Opinion and Dissent of the Court of Appeal of the State of California, Fourth Appellate District, Second Division	1
	(Dissent)	19
"B"	Denial of Petition for Rehearing in the Court of Appeal of the State of California, Fourth Appellate District, Second Division	45
"C"	Denial of relief from default (letter dated April 25, 1977, from the office of the Clerk, Supreme Court of California)	46
"D"	Petition Requesting Court To Grant Hearing On Its Own Motion, Pursuant To California Rules of Court, Rule 28(a), And Declaration In Support Thereof. Points and Authorities. Stamped "Received May 6, 1977, Clerk, Supreme Court" [of California]	48
"E"	Letter dated May 12, 1977, from the office of the Clerk, Supreme Court of California, ignoring above petition and refusing to hear the matter on its own motion	51

APPENDIX "A"

OPINION AND DISSENT OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

CERTIFIED FOR PUBLICATION

In the Court of Appeal, Fourth District, Second Division, State of California.

BRUCE JOHNSON, et al., Plaintiffs and Appellants, v. HUNTINGTON BEACH UNION HIGH SCHOOL DISTRICT, et al., Defendants and Respondents.

4 Civil 15738. (Sup. Ct. No. 228389).

[FILED MAR 11 1977]

APPEAL from a judgment of the Superior Court of Orange County. Lloyd E. Blanpied, Jr., Judge. Judgment affirmed.

Christopher Hall and Kenneth Roberts for Plaintiffs and Appellants.

Rutan & Tucker and David C. Larsen for Defendants and Respondents.

Anti-Defamation League of B'Nai B'Rith and David A. Lehrer as Amici Curiae on behalf of Defendants and Respondents.

Plaintiffs (high school students) sought judicial relief from a refusal of the Huntington Beach Union High School District (district) to permit a voluntary student Bible study club to meet and conduct its activities on the school campus during the school day. The trial court sustained the district's action and denied plaintiffs the relief sought.

The operative facts set forth in the stipulated facts on which the cause was heard and submitted may be summarized as follows: The district is charged with supervising and establishing rules and regulations for high schools within the district. Plaintiffs are students at Edison High School, a public tax-supported secondary school under the jurisdiction of the district.

Pursuant to statutory authority,[1] the district has provided for recognition of student clubs[2] and has prescribed regulations under which such clubs may operate on high school campuses.[3] Under the district's rules, student organ-

---

[1]See Education Code sections 10701, 10702, 10704, 10604, 1052.

[2]The district's "Policy No. 5144" reads:

"Clubs recognized by the board of trustees are those which are sponsored by the individual schools of the district. Clubs shall be responsible to the school through which they are organized. Such clubs may not be secret for, as indicated in the Education Code, it is 'unlawful for any pupil enrolled in any elementary or secondary school in the state to join or become a member of any secret fraternity, sorority or club wholly or partly formed of pupils attending the public schools, or to take part in the organization or formation of any such fraternity, sorority or club . . . . ' "

[3]The regulations implementing the district's policy on student clubs are set forth in "Staff Rule No. 5144," which reads:

"Clubs

"School Sponsored

"Clubs Recognized

"Clubs recognized by the individual school will be those sponsored by the school. These clubs must be directly responsible to the school.

"Charters

"The organization's charter must be approved by Associated Students' governing body and *by the Principal of the school.*

"Membership

"Membership must be limited to the students attending the school, and must be open to all students who meet the qualifications and standards of membership set forth in the club charter.

"Charter Filing

A copy of the charter must be on file in the Principal's office.

"The organization must:

"1. Be sponsored by a member of the faculty appointed by the Principal.

"2. *Deposit all monies* collected and *check out* all monies through the school's financial secretary according to school regulations. All club accounts shall be audited.

"3. Have the approval of the sponsor for the time and place and all activities carried on by the organization, including regular meetings. The sponsor must be present at all meetings.

izations may not have free use of classrooms or school facilities other than by applying for and receiving recognition, i e , official approval to operate on the campus as a student club. For many years the district has permitted and still permits high schools under its jurisdiction to grant recognition to student clubs and to permit such clubs to use classrooms and other spaces for club meetings and to publicize their activities through the school newspaper and school bulletin boards. The district did not, however, permit student religious clubs to meet on the school campus during the school day.[4]

On January 8, 1974, the district passed an interim policy resolution permitting student religious clubs to meet on campus during the school day pending legal clarification from the

---

(3 cont'd)

"4 Request and receive approval from the school Principal for special social events.

"School-sponsored clubs may be permitted

"1. to use official name of the school

"2. to use building and other facilities

"3 to have publicity in daily bulletins, bulletin boards and school publications.

"4. to wear identifying emblem but not special clothing

"5 to sell on school premises tickets or bids to special activities sponsored by the club

"Deviations

"Deviations from any of the requirements may be made only with the approval of the Associated Students' governing body and the school Principal.

"Private Clubs

"No off-campus or private clubs are permitted to function in the school They are also restricted from advertising in any form.

"Secret Clubs

"Education Code, Section 16075 [now section 10604], makes it 'unlawful for any pupil enrolled in any elementary or secondary school to join or become a member of any secret fraternity, sorority, or club wholly or partly formed of pupils attending the public schools, or to take part in the organization or formation of any such fraternity, sorority, or club . . . ' "

"Obligation of the Principal

"It is the obligation of the Principal to see that the clubs and organizations of the school are not of secret nature and that they are not in any way selective or discriminatory " (Original emphasis)

[4]It was stipulated that students, as well as members of the community, may apply for use of school facilities under the Civic Center Act (Ed Code, § 16551 et seq.) but that the district would not grant an application under the act by a student group to use classrooms or other meeting rooms for religious purposes during the school day.

Orange County Counsel and the Attorney General. The County Counsel informed the district that it could not constitutionally permit student religious clubs to meet on the campus during the school day Consequently the district rescinded its interim resolution and reinstated its long-standing policy of denying recognition to student religious groups. Subsequently the Attorney General also rendered an opinion supporting the conclusion of the County Counsel and the action taken by the district. (59 Ops. Cal. Atty. Gen. 214.)

Over 100 Edison High School students responded to the district's action with a written application seeking formal recognition of a club whose express purpose was "to enable those participating to know God better . . . by prayerfully studying the Bible" and whose membership would be open only to those who "have a genuine interest in the fulfilling of the purpose of this organization."[5] School officials at Edison High rejected the petition and the district's board of trustees did likewise.

Plaintiffs filed suit for injunctive and declaratory relief to establish their claimed rights to official club recognition, to use school classrooms and other space during the school day for club meetings, to use bulletin boards and similar facilities for the posting of club activities, and to have access to the school newspaper for purposes of publicizing club events. The cause was heard on the pleadings and stipulated facts. Following argument and submission, the trial judge rendered an intended decision that school recognition of plaintiffs' Bible study club would impermissibly advance

[5]The term "Bible" as used in the club's constitution refers to the 66 books collectively referred to as the Old and New Testaments.

religion and would cause the state to penetrate the federal and state constitutional barriers between church and state.[6] Judgment was entered decreeing that the district was prohibited from recognizing plaintiffs' Bible study club or from assisting plaintiffs in their efforts to form a religious club and that the school's posture of nonrecognition did not violate plaintiffs' free exercise or other First Amendment guarantees Plaintiffs appeal from that judgment

Plaintiffs do not challenge either the district's authority to promulgate rules for the operation of student clubs on campus or the validity of the existing rules.[7] They attack the judgment below on the ground that there are no federal or state constitutional proscriptions against school authorities permitting plaintiffs' Bible club to meet and conduct its activities on campus during the school day on the same footing as other student clubs and that refusal to grant such permission violates plaintiffs' First and Fourteenth Amendment rights From the analysis which follows, we have concluded that the issues were correctly resolved by the trial court and that the judgment should be affirmed.

The First Amendment to the United States Constitution provides in relevant part: "Congress shall make no

[6]Findings of fact and conclusions of law were not requested by either party and none were made.

[7]The entire thrust of plaintiffs' suit in the court below was that they were entitled to recognition of their club and to the use of school facilities under the district's regulations on the same basis and to the same extent as are enjoyed by other student organizations They made no attack on the validity of the regulations themselves For the first time on appeal plaintiffs assert that the regulations are void for "vagueness and overbreadth" and for lack of "standards," but they fail to point out in what particulars the regulations are vague or overbroad or lack adequate standards Failure to support a point by legal argument and discussion may be deemed an abandonment of the contention (*Huntington Beach Police Officers Assn. v. City of Huntington Beach*, 58 Cal App 3d 492, 504)

law respecting an establishment of religion, or prohibiting the free exercise thereof . . . . " In erecting a wall of separation between church and state, the framers of our Constitution acted upon the belief " 'that a union of government and religion tends to destroy government and to degrade religion.' [Citation.] When government . . allies itself with one particular form of religion, the inevitable result is that it incurs 'the hatred, disrespect and even contempt of those who held contrary beliefs.' " (*Abington School District v. Schempp*, 374 U.S. 203, 221-222 [10 L.Ed.2d 844, 83 S.Ct. 1560] quoting *Engel v. Vitale*, 370 U.S. 421, 431 [8 L.Ed.2d 601, 82 S.Ct. 1261].) Provisions of the First Amendment, including the Establishment Clause, are subsumed under the Due Process Clause of the Fourteenth Amendment and govern state action. (*Committee for Public Education v. Nyquist*, 413 U.S. 756, 760, fn. 2 [37 L.Ed.2d 948, 93 S.Ct. 2955].)

Preservation of religious liberty and the maintenance of governmental neutrality have undergone their severest test in the context of religious exercises within school corridors. In quick succession the Supreme Court of the United States passed upon two "release time" programs which were challenged as violative of the Establishment Clause. *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203 [92 L.Ed.649, 68 S.Ct. 461], put before the court a program whereby the school turned over its classrooms during the school day to religious groups which, one day a week for 30 minutes, substituted religious training for the secular education provided under the compulsory education law. The court held that the use of tax-supported property for religious instruction during a time

when students were compelled by law to attend school resulted in the state becoming an active participant in religious affairs and thereby violated its constitutonal obligation of neutrality. (333 U.S. at pp. 209-210.)

Sensitive to the religious needs of its pupils but cognizant of its constitutional duties, New York devised a release time program whereby students were released from school to receive spiritual training at the church of their belief. Students were released only upon written request of their parents; those not released remained in the classroom. This program withstood constitutional scrutiny in *Zorach v. Clauson*, 343 U.S. 306 [96 L. Ed. 954, 72 S. Ct. 679; Justices Black, Jackson and Frankfurter dissenting].) The court noted that while it is the philosophy of the First Amendment to erect a citadel where neither state nor church would invade the precinct of the other, not all cooperation between the secular and the religious is condemned. (343 U.S. at pp. 312-313.) As much as the state must remain neutral in the affairs of religion, neither can it assume a posture of hostility. (343 U.S. at pp. 313-314.) Thus, a course of accommodation involving nothing more than school officials adjusting educational schedules to meet sectarian needs of its students was found consistent with constitutional precepts. (343 U.S. at p. 314.)[8]

A state policy of accommodation, however, can overstep constitutional limits and become an impermissible form of aid to religion. In *Abington School District v. Schempp, supra*, 374 U.S. 203, school officials instituted a practice whereby passages of the Bible were read without comment at the

---

[8]The area of accommodation has been explored by noted commentators (See Religion and the Public Order (edited by Giannela, 1963) pp. 17-23; Kauper, *Prayer, Public Schools and the Supreme Court* (1963) 61 Mich. L. Rev. 1031, 1066-1068.)

beginning of each school day. Those students not wishing to participate were permitted to absent themselves. The court noted that although our heritage and culture is in part grounded in the belief in the almighty (374 U.S. at pp. 212-213), the Constitution mandates governmental neutrality which neither prefers one religion over another nor advances all religion but instead creates a sanctuary where all religions may flourish without governmental interference. (374 U.S. at pp. 217-219.) Governmental neutrality and religious freedom, the court observed, can be preserved only by the segregation of secular activity from religious pursuit through the banishment of all governmental allegiance with religion. (374 U.S. at pp. 216-217.) The court concluded that state sponsorship of Bible reading during the school day violated the principle of neutrality, placed the state behind religious inculcation and infringed the free exercise rights of nonbelievers. (374 U.S. at pp. 222-227; see also: *Engel v. Vitale, supra,* 370 U.S. 421 [prohibiting the recitation of prayer at the beginning of the school day].)

In *Lemon v. Kurtzman,* 403 U.S. 602, 612-613 [29 L. Ed.2d 745, 91 S.Ct. 2105], the high court announced a tripartite test, synthesized from criteria developed by prior decisions, for determining whether state action involves a violation of the Establishment Clause. To pass constitutional muster the state activity must satisfy three conditions: (1) It must have a secular legislative purpose; (2) its primary effect must neither advance nor inhibit religion; and (3) it must not foster excessive governmental entanglement with religion. (See also: *Meek v. Pittenger,* 421 U.S. 349, 358 [44 L.Ed.2d 217, 95 S.Ct. 1753] [upholding school textbooks

loans to nonpublic school children but invalidating loans of other instructional material made directly to nonpublic schools]; *Committee for Public Education v. Nyquist, supra,* 413 U.S. 756, 772-773 [invalidating a system of tax credits and tuition reimbursements to low income families who sent their children to nonpublic schools].) Failure to meet any one of the three conditions is fatal to the constitutionality of state action. (See e.g., *Committee for Public Education v. Nyquist, supra; Lemon v. Kurtzman, supra; Abington School District v. Schempp, supra,* 374 U.S. 203.)

No test, however, can be applied with precision in determining where the line between church and state should be drawn; the problem, like many in constitutional adjudication, is one of degree. (*Zorach v. Clauson, supra,* 343 U.S. at p. 314.) The high court has cautioned that the tripartite *Lemon* test is to be viewed, not as a formula prescribing the precise scope of constitutional inquiry, but as a touchstone with which to identify instances where the objectives of the Establishment Clause have been compromised. (*Meek v. Pittenger, supra,* 421 U.S. 349, 358-359.) The primary evils the Clause was intended to protect against are "sponsorship, financial support, and active involvement of the sovereign in religious activity." (E.g., *Meek v. Pittenger, supra,* at p. 359; *Lemon v. Kurtzman, supra,* 403 U.S. 602, 612; *Walz v. Tax Commission,* 397 U.S. 664, 668 [25 L.Ed.2d 697, 90 S. Ct. 1409].) We proceed to apply the foregoing precepts to the case at bench.

The precise question we must decide is whether school officials of a tax-supported high school of the district may permit plaintiffs' Bible study club to meet and conduct its activities on the school campus during the school day under regulations governing student clubs. The administrative action

which plaintiffs seek would constitute state action and as such must withstand constitutional scrutiny under the guidelines enunciated in *Lemon v. Kurtzman, supra,* 403 U.S. 602.

To the extent that the first prong of the tripartite test may be applicable it is only necessary to observe that the exercise of the power to permit student organizations to conduct their activities on school campuses during the school day in accordance with district rules and regulations is in the abstract secular in nature.

However, in adjudging whether the "primary effect" of the state action sought by plaintiffs advances religion, we must examine its consequence not in the abstract but as applied to the Bible study club. (See *Hunt v. McNair,* 413 U.S. 734, 742 [37 L. Ed.2d 923, 93 S. Ct. 2868].) In this regard, the Supreme Court has cautioned that the crucial inquiry is not whether some benefit accrues to a religious institution as a consequence of state action, but whether its primary effect advances religion. (*Tilton v Richardson,* 403 U.S. 672, 679 [29 L. Ed. 2d 790, 91 S. Ct. 2091].) Aid may be said to have an impermissible primary effect of advancing religion "when it funds a specifically religious activity in an otherwise substantially secular setting." (*Hunt v. McNair, supra,* at p. 743; *Meek v. Pittenger, supra,* 421 U.S. 349, 365-366.)

Plaintiffs do not dispute the fact that the club's mission, "to enable those participating to know God better so that they will be better persons . . . by prayerfully studying the Bible," is religious in nature. It is also apparent that if the club is permitted to meet and conduct its activities on the school campus as a student club as demanded by plaintiffs, state financial support would flow

directly to the club. It would be entitled to use classroom space rent free, receive heat and light and would be monitored by a paid faculty sponsor. The district would also be obligated at its expense to audit club finances.[9] One of the factors differentiating *McCollum* from *Zorach* was the free use of school facilities, classrooms, heat and light. (*Zorach v Clauson, supra,* 343 U.S. 306, 308-309.) Thus this financial subsidy alone may be sufficient to compel constitutional condemnation of the requested state action.

We do not rest our decision, however, on financial aid alone.[10] The "primary effect" test bespeaks not only of financial assistance but also necessarily inquires whether the consequence of state action is to place its imprimatur upon the religious activity. (*Abington School District v Schempp, supra,* 374 U.S. 203, 216-219, 221-222; *Engel v. Vitale, supra,* 370 U.S. 421, 430-536. See also: *Reed v Van Hoven, supra,* 237 F. Supp. 48, 51-53.) This aspect of the effect test reaches the essence of the Establishment Clause proscription. In *Abington School District v Schempp, supra,* the court cogently observed: " 'The [First] Amendment's purpose was not to strike merely at outlawing only a formal relation such as had prevailed in England and some of the colonies. Necessarily it was to uproot all such relationships. But the object was broader than separating church and

---

[9] See footnote 13, *infra.*

[10] There are advocates of the view that mere use of school property alone is not offensive to the Constitution so long as the religious activity is wholly separate from the official school day. (See, e.g., *Wood v. Mt. Lebanon Township School District* (W. D. Pa. 1972) 342 F. Supp. 1293, 1295; *Reed v. Van Hoven* (W. D. Mich. 1965) 237 F. Supp. 48, 54-57; *Keegan v. University of Delaware* (Del. 1975) 349 A.2d 14, 17-18; *Lawrence v. Buchmueller* (1963) 243 N.Y.S.2d 87, 88-90; but see: *Hunt v. Board of Education of County of Kanawha* (S.D. W.Va. 1971) 321 F. Supp. 1263, 1266.)

state in this narrow sense. It was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion.' " (374 U.S. 203, 217, quoting *Everson v. Board of Education*, 330 U.S. 1, 31-32 [Rutledge, J. dissenting].) The point is that impermissible governmental support is present when the weight of secular authority is behind the dissemination of religious tenets.

It is in the foregoing respect that permitting plaintiffs' Bible study club to meet and operate on the school campus during the school day most offends establishment principles. Under the district's rules and regulations, the club will become an entity "sponsored by the school" and as such will be entitled to use the school name in connection with its activities, to free use of school premises and property, to access to the school newspaper and school posting facilities to advertise its activities, and to solicit contributions on campus during the school day. Thus, the consequence of permitting the club to operate on campus as a recognized student organization is to place school support and sponsorship behind the religious objectives of the club. The Bible study club would implicitly become an integral part of the school's extracurricular program conducted during the school day[11] when students are compelled by law to attend the school.

The state action which plaintiffs seek would also run afoul of the third prong of the *Lemon* test. The school would be required to supply a "faculty sponsor" who would

---

[11] Plaintiffs concede that the lunch hour during which the club proposes to meet is an inseparable part of the school day. (See statutory authorities cited at fn 12, *infra*.

be required to attend all club functions and approve all club activities.[12] The school would also be required to audit the club's financial accounts[13] and review membership procedures to ensure they are neither secret nor discriminatory.[14] Thus, permitting the Bible study club to operate on campus would foster excessive state entanglement with religion.

An additional factor which cannot be ignored in the context of the Establishment Clause is the potential for divisiveness in matters of religion which the requested state action to be evaluated may engender. (*Committee of Public Education v. Nyquist, supra*, 413 U.S. 756, 797-798; *Lemon v. Kurtzman, supra*, 403 U.S. 602, 622. See also: *Abington School District v. Schempp, supra*, 374 U.S. 203, 298 [concurring opinion of Justice Brennan].) Students who are members of less orthodox religions may be unable to organize a club because of insufficient student support or unavailability of a faculty sponsor. In such event, the free exercise rights of the minority might well be infringed by the pressure upon them to conform to the beliefs of the recognized religious club. Even if we assume that the spectrum of religious beliefs present in the national community is represented at the school,

---

[12] A school district is required to maintain supervision over the conduct of its pupils during school hours, including recesses and lunch hours. (Ed. Code, § § 13557, 13557.5; 5 Cal. Admin. Code, § 303; *Taylor v. Oakland Scavengery Co.*, 17 Cal. 2d 594, 600.) Even if a nonfaculty assumes this function, provision is made for his reimbursement. (Ed. Code, § 20801.)

[13] Education Code section 10704 provides:
"The governing board of any school district shall provide for the supervision of all funds raised by any student body or student organization using the name of the school.
"The cost of supervision may constitute a proper charge against the funds of the district.
"The governing board of a school district may also provide for a continuing audit of student body funds with school district personnel."

[14] Education Code section 10604 prohibits pupil membership in secret clubs.

there is a real possibility that competing sects or beliefs will vie for school permission to operate on campus. Manifestly this could engender student divisiveness in matters of religious beliefs.

In sum, the school machinery implicated in permitting the student Bible study club to meet on campus under the district's rules and regulations goes far beyond the accommodation endorsed in *Zorach*. There the school cooperated with religious institutions only to the extent of adjusting its schedule to make it possible for the students who wished to do so to repair to their respective houses of worship to partake in religious activities off campus. The teachers did not sponsor, participate in, or monitor the religious function. Religion must be a private matter wholly untouched by state involvement or sponsorship. (*Lemon v. Kurtzman, supra,* 403 U.S. 602, 625.) The school permission sought by plaintiffs would meld the secular with the sectarian and would empower the Bible study club members to use the prestige and authority of the school in proselytizing their beliefs among students whose presence on the campus is compelled by law and who may be vulnerable to the pressure of an officially recognized student religious organization. This, the First Amendment will not permit.

To this point we have concerned ourselves only with the federal Establishment Clause. However, section 4 of article 1 of the California Constitution contains an Establishment Clause identical to that of the First Amendment to the federal Constitution.[15] For all of the reasons heretofore stated, we

[15]Section 4, article 1 of the California Constitution revised November 5, 1974, provides:

"Free exercise and enjoyment of religion without discrimination or preference are guaranteed. This liberty of conscience does not excuse acts that are licentious or inconsistent with the peace or safety of the State. The Legislature shall make no law respecting an establishment of religion."

hold that the state action in question is proscribed by the Establishment Clause of the state Constitution.

Furthermore, section 5 of article 16 of the California Constitution also compels us to uphold the school district's action. The section provides in relevant part: "Neither the Legislature nor any . . . school district . . . shall ever make an appropriation, or pay from any public fund whatever, or grant anything to or in aid of any religious sect, church, creed, or sectarian purpose. . . ."[16] In *California Educational Facilities Authority v. Priest,* 12 Cal. 3d 593, the court observed: "The section thus forbids more than the appropriation or payment of public funds to support sectarian institutions. It bans any official involvement, whatever its form, which has the direct, immediate, and substantial effect of promoting religious purposes." (At p. 605, fn. 12.) As we have explained, permitting the club to operate on campus implicates school authority and prestige behind the dissemination of religious dogma. This benefit cannot be viewed as "incidental to a primary public purpose." (12 Cal. 3d at p. 605.) Indeed the primary purpose to be served by permitting the club to operate on campus as a student organization is to promote sectarian tenets, an intrinsically religious function. We are, therefore, compelled to conclude that the California Constitution will not suffer school officials to permit plaintiffs'

(15 cont'd)

[16]Article 9, section 8 of the state Constitution provides in pertinent part:

"No public money shall ever be apportioned for the support of any sectarian or denominational school . . . nor shall any sectarian or denominational doctrine be taught, or instruction thereon be permitted, directly or indirectly, in any of the common schools of this State."

In view of our holding that article 16, section 5 of the state Constitution proscribes school recognition of plaintiffs' club, we find it unnecessary to chart the limits and sweep of article 9, section 8's proscription.

Bible study club to meet and conduct its activities on school campus during the school day.

Plaintiffs argue that refusal to permit their club to operate on the campus on the same footing as other student clubs infringes upon rights guaranteed to them under the First and Fourteenth Amendments of the United States Constitution. The argument must be rejected. The Free Exercise Clause of the federal Constitution embodies two rights: Freedom to believe and freedom to act. "The first is absolute but, in the nature of things, the second cannot be." (*Cantwell v. Connecticut*, 310 U.S. 296, 303-304 [84 L. Ed. 1213, 60 S. Ct. 900].) Under the Free Exercise Clause, freedom of conscience and freedom to adhere to such religious organizations or beliefs as the individual may choose is secured against governmental interference. (*Cantwell v. Connecticut, supra*.) This is not to say, however, that religion may be exercised wherever and whenever the adherent chooses. (*Wisconsin v. Yoder*, 406 U.S. 205 [32 L. Ed. 2d 15, 92 S. Ct. 1526]; *Poulos v. New Hampshire*, 345 U.S. 395, 405 [97 L. Ed. 1105, 73 S. Ct. 760]; *Cantwell v. Connecticut, supra*, 310 U.S. 296.) The inevitable consequence of the Establishment Clause when applied to religious ritual on school property[17] is to restrict that activity

[17] Plaintiffs' reliance upon *Saia v. New York*, 334 U.S. 558 [92 L. Ed. 1574, 68 S. Ct. 1148]; *Kunz v. New York*, 340 U.S. 290 [95 L. Ed. 280, 71 S. Ct. 328], and *Niemotko v. Maryland*, 340 U.S. 268 [95 L. Ed. 267, 71 S. Ct 312], which sanctioned the use of public parks as a forum for religious teaching is misplaced. The public school is organized " 'on the premise that secular education can be isolated from all religious teaching so that the school can inculcate all needed temporal knowledge and also maintain a strict and lofty neutrality as to religion.' " (*Abington School District v. Schempp, supra*, 374 U.S. 203, 218, quoting *Everson v. Board of Education, supra*, 330 U.S. 1, 23-24 [Jackson, J. dissenting].) Justice Stewart in his dissent in *Schempp* also noted the unique circumstances of religious exercise on school property: "Our decisions make clear that there is no constitutional bar to the use of government property for religious purposes. On the contrary, this Court has consistently held that the discriminatory barring of religious groups from public property is itself a violation of First and Fourteenth Amendment guarantees. [Citations.] A different standard has been applied to public school property, because of the coercive effect which the use by religious sects of a compulsory

to preserve the wall between church and state. " 'Our constitutional policy . . . does not deny the value or the necessity for religious training, teaching or observance. Rather it secures their free exercise. But to that end it does deny that the state can undertake or sustain them in any form or degree. For this reason the sphere of religious activity, as distinguished from the secular intellectual liberties, has been given the two fold protection and, as the state cannot forbid, neither can it perform or aid in performing the religious function. The dual prohibition makes that function altogether private.' " (*Abington School District v. Schempp, supra*, 374 U.S. 203, 218-219, quoting from *Everson v. Board of Education, supra*, 330 U.S. 1, 52 [Rutledge, J. dissenting].)

This is not a case where plaintiffs are denied access to all public forum for religious expression; they are merely being denied use of school property during the school day for religious purposes. This deprivation in no way infringes upon their religious rights when practiced outside the confines of the school. Plaintiffs are only being denied religious expression in a manner involving state participation. Each club member remains free to believe and express his religious beliefs on an individual basis and the students' Bible study club is free to meet as such off campus outside of school hours. There is no infringement of plaintiffs' free exercise rights except to the limited extent made necessary by the

(17 cont'd)
school system would necessarily have upon the children involved. [Citation.]" (*Abington School District v. Schempp, supra*, 374 U.S. at p. 314.) It cannot be said, therefore, that the power of the state to sanction religious practice on its property applies with equal force to all governmental property, irrespective of the nature of the property and governmental involvement resulting from such use.

Establishment Clause of the state and federal Constitutions.[18]

Judgment is affirmed.

CERTIFIED FOR PUBLICATION.

TAMURA,
J.

I concur:

GARDNER,
P. J.

[18] For cases in other jurisdictions holding that the Free Exercise Clause is not violated by denying religious adherents use of school property, see: *Stein v. Oshinsky* (2d Cir. 1965) 348 F.2d 999, 1001-1002 [cert. den., 382 U.S. 941]; *Hunt v. Board of Education of County of Kanawha* (S.D. W.Va. 1971) *supra*. 321 F. Supp. 1263, 1265-1266.

[DISSENT]

CERTIFIED FOR PUBLICATION

I dissent.

Before setting down the reasons for my disagreement with the majority, I respectfully note that it is necessary to amplify the recitation of facts which brought this litigation before us.

The proceedings in the trial court were based upon an agreed statement of facts tendered over the stipulation of counsel. Paragraph 18 of that stipulation stated: "The District's Board of Trustees has never issued to the individual schools any written instructions, guidelines or other writing purporting to define, describe or set forth any criteria as to what is meant by a club being 'sponsored' by an individual school as the word 'sponsored' is used in the provision of Board Policy No. 5144 that 'Clubs recognized by the board of trustees are those which are sponsored by the individual schools of the district.' Neither has the District issued any such written instructions, guidelines or other writing with the exceptions of Board Policy No. 5144 itself (Exhibit A to this Stipulation) and Staff Rule No. 5144 (Exhibit B to this Stipulation)."[1]

Paragraph 19 of that stipulaton stated: "Except as set forth in paragraph 20, below, there is no manner in which groups of students at a high school in the Huntington Beach Union High School District can regularly have use of rooms or other space at such high school apart from applying for

[1] Board Policy No. 5144 and Staff Rule No. 5144 are quoted in the majority opinion.

recognition as a student club."

Paragraph 20 of that stipulation stated: "A student or other members of the community may apply through the Civic Center Act[2] for use of school facilities as prescribed by law. The rules of the District respecting applications for use of school facilities under the Civic Center Act are attached hereto as Exhibit G and by this reference are made a part hereof."

Paragraph 21 of that stipulation stated: "The District would not grant an application made under the Civic Center Act by a group of students if the application requested use of rooms or other meeting space at a high school, if the purpose of the meeting was to enable the participating students to prayerfully study the Bible for the intended purpose of knowing God better so that they will be better persons, and if the meeting was proposed to be held at any time during the school day (i.e., at any time between the time that students are first required to report their attendance in the morning until the last class is dismissed in the afternoon)."

From a reading of Paragraph 18 of the stipulation, it can be fairly observed that the statement of the majority that "the consequence of permitting the club to operate on campus as a recognized student organization is to place school support and sponsorship behind the religious objectives of the

---

[2]The Civic Center Act refers to section 16556 of the Education Code which reads:

"There is a civic center at each and every public school building and grounds within the state where the citizens, parent-t[illegible]hers' association, Camp Fire Girls, Boy Scout troops, farmers' organizations[illegible]ol-community advisory councils, senior citizens' organizations, clubs, and asso[illegible]ations formed for recreational, educational, political, economic, artistic, or moral activities of the public school districts may engage in supervised recreational activities, and where they may meet and discuss, from time to time, as they may desire, any subjects and questions which in their judgment appertain to the educational, political, economic, artistic, and moral interests of the citizens of the communities in which they reside. Governing boards of the school districts may authorize the use, by such citizens and organizations of any other properties under their control, for supervised recreational activities."

club" is not necessarily dictated by the facts. Similarly, it is not the necessary result of the stipulated facts that "[t]he school permission sought by plaintiffs would meld the secular with the sectarian and would empower the Bible study club members to use the prestige and authority of the school in proselytizing their beliefs among students whose presence on the campus is compelled by law and who may be vulnerable to the pressure of an officially recognized student religious organization." To state that club members would use the prestige and authority of the school in proselytizing their beliefs exceeds the stipulation of facts, and, as speculation, is not the inevitable result to be expected if the plaintiffs' club were allowed to meet on the school premises.

The purpose for expanding the factual predicate, as disclosed by the record, beyond that upon which the majority opinion is based is to question, if recognition sought were granted, whether there would be "secular authority . . . behind the dissemination of religious tenets." Putting it plainly, how can the court presume to announce the factual consequences of what "recognition" and "sponsor" mean when the defendant school district has not itself done so during the approximately 15 years that the policy and rule have been in effect?

For instance, it could just as logically be argued that the factual purpose for having a "sponsor" present would be for disciplinary and safety reasons and for other aspects of pupil citizenship such as are implied in Board Policy No. 5144 where it is indicated that "[c]lubs shall be *responsible* to the school through which they are organized." (Emphasis added.)

Otherwise, before turning to a discussion of the legal

precepts invoked by the majority, it is also significant to pay heed to the limitations upon the free expressions of the plaintiffs represented by the circumstances disclosed in paragraphs 19, 20, and 21 of the agreed statement of facts. The net result of the circumstances there recited, coupled with the present refusal to recognize the plaintiffs' club, is that there is no way whatsoever that plaintiffs can gather during school hours on school property to give verbal expression to their religious views and beliefs. This proscription applies under the majority view, notwithstanding that other groups of students gathering together on school property during school hours, do have their rights recognized under the Free Expression Clause of the First Amendment, United States Constitution, provided their subject of discourse is recreational, educational, political, economic, artistic, moral, or even agnostic. (See Ed. Code, § 16556.)

Proceeding from this addendum to the factual statement of the majority, and in terms of marshaling the precedents, there are two grounds, equally and independently valid in my view, on which I venture to dispute the majority result. The first is that the Establishment Clause, First Amendment, United States Constitution *does not* forbid the granting of the recognition plaintiffs here seek for their club. The second, assuming that the Establishment Clause *is* involved, is that, to the extent that any harm may be perceived in the recognition sought, such harm is far outweighed by the need to preserve and protect for the plaintiffs their rights of free expression and equal protection of the laws. These rights are now denied them in my view by reason of the refusal of recognition coupled with the circumstances described in paragraphs 19, 20, and 21.

* * * * *

Turning then to a discussion of the first technical ground for dissent, I respectfully suggest, on the facts before us, that the so-called recognition of their club which the plaintiffs seek would not, if granted, transgress upon what is proscribed by the Establishment Clause.[3] Proceeding with an orthodox effort to affirm the correctness of this proposition in the light of precedent, it must be conceded by the majority that there are only four latter-day opinions delivered by the United States Supreme Court dealing directly with religious activities of public school pupils during school hours. In three of these four opinions it was ruled that public schools cannot *sponsor* religious activities, and it requires only a cursory look at the facts of those cases to gain an insight into what was meant by the use of the term *sponsor*. Certainly, it was nothing even remotely akin to the "sponsorship" sought by the plaintiffs for their club.

In *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203 [92 L. Ed. 649, 68 S. Ct. 461], a school board *affirmatively required* 30-minute, religious-instruction periods to be held each week in the classrooms, using outside religious instructors under the control of the superintendent of schools. Participation was voluntary, but those not wishing to join in were required to go elsewhere in the building for some sort of secular instruction. Surely, such requirement can be readily characterized as directly athwart of the Establishment Clause as now interpreted.

---

[3] As a practical matter, one wonders why the school authorities did not leave well enough alone and continue with their policy began on January 8, 1974. No one was objecting; there was no outcry from the community. What appeared to be reasonable to both the administration and the students was thwarted by the fateful opinion of the county counsel which spawned this litigation.

In *Engel v. Vitale*, 370 U.S. 421 [8 L. Ed. 2d 601, 82 S. Ct. 1261], the rules of the school board *affirmatively required* daily morning ceremonies in the classroom. These ceremonies took the form of a "denominationally" neutral prayer read word for word as composed by some state official or agency. This too was obviously violative of the rule against the state establishment of religion.

In *Abington School District v Schempp*, 374 U.S. 203 [10 L. Ed. 2d 844, 83 S. Ct. 1560], it was the state which *affirmatively required* daily reading in class from the Bible followed by the recitation of the Lord's Prayer. Student participation was voluntary, but the ritual was compulsory. Such a requirement was also found to be within the prohibition of the Establishment Clause.

However, the fourth of the group of cases noted is readily distinguishable from the other three. It is from this distinction that we can deduce the meaning of the word "sponsor" as used in this type of case. In *Zorach v. Clauson*, 343 U.S. 306 [96 L. Ed. 954, 72 S. Ct. 679], there was a weekly arrangement similar to that obtaining in *McCollum*. The difference, however, was that the weekly religious instruction was not held in the classroom and the instructors were not under the control of the school superintendent. The *accommodation* of such activity was held to be constitutionally permissible.

One might tend to see the distinction of *Zorach* from the other three as arising from the physical location of the religious activity and therefore condemn the activity for which plaintiffs seek sanction because it is intended to be conducted on school property. However, no such mechanistic simplicity is at the heart of the distinction. In the course of the opinion in *Zorach* the majority stated that the ground for outlawing the activity in

McCollum was that the use of the classrooms for religious instruction meant that the "force of the public school was used to promote that instruction." (*Zorach v. Clausen, supra*, 343 U.S. 306, 315.) From this it can be seen that it was the combination of classroom and mandatory instruction which was held to be constitutionally impermissible, the implication being, if *accommodation* only was involved, that religious activity could permissibly occur on the school grounds.

That this was the true basis for the distinction between *Zorach* and the other three cases can be traced in a series of lower court cases. In *Reed v Van Hoven*, 237 F. Supp. 48, 53, a federal district court upheld a truly voluntary on-campus prayer program which did not appear to have the imprimatur of the school. In *Lawrence v Buchmueller*, 243 N.Y.S.2d 87, a New York court found no Establishment Clause violation in a creche being allowed on school property under circumstances where "[u]nlike *Engel* . . . or *Schempp* . . . which concerned active involvement by Government in religious exercises, the present case constitutes, at most, merely a passive accommodation of religion . . . " (*Id.* at pp. 90-91.) In *Wood v. Mt. Lebanon Township School District*, 342 F. Supp. 1293, a federal district court found no Establishment Clause violation in allowing invocational and benedictional prayers to be said in on-campus graduation ceremonies where there was no "semblance of governmental establishment or even condonation." (*Id.* at p. 1295.)

The fact that the physical place of the religious activity is not the controlling factor was inversely confirmed in *Moore v. Board of Education*, 212 N.E.2d 833, where an Ohio court would *not* countenance a release-time program *off* the school campus where the facts indicated that, in the contemplation

of the pupils, it looked like the school was conducting the religious instruction. From this analysis it then can be conscientiously urged that it is a permissible governmental or state posture to accommodate the religious interests of school pupils on the school premises. Taking it a step further, in *Stacy v. Williams*, 306 F. Supp. 963, a three-judge federal court held *invalid* (on Equal Protection grounds) a University of Mississippi regulation which singled-out and forbade on-campus religious meetings, pointing out that the University's approval of any activity can easily be negated by merely announcing at the time that the university did not necessarily subscribe to its content. (*Id.* at p. 974.)

To afford guidance to a determination of just where one finds legal accommodation as contrasted to illegal sponsorship, the United States Supreme Court in *Lemon v. Kurtzman*, 403 U.S. 602 [29 L. Ed. 2d 745, 91 S. Ct. 2105], laid down a three-pronged test by which to measure the statute in question or, as here, the non-statutory state action represented by the school district's "recognition" of plaintiffs' club. To quote from *Lemon*, "[f]irst, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion [citation]; finally, the statute must not foster 'an excessive government entanglement with religion.' [Citation.]" (*Id.* at pp. 612-613.)

Measuring the proposed district action against the three criteria, both sides agree that the recognition procedure has a secular purpose. Proceeding to the second point, the majority reached the conclusion that the primary effect of recognition would be that "[t]he Bible study club would implicitly become an integral part of the school's extracurricular

program conducted during the school day when students are compelled by law to attend the school." I respectfully point out that they reached this conclusion as a result of their misconception of what "sponsorship" by the school actually entailed. Without explaining just how it would come about, the majority seems to take it for granted that the few simple procedures recited by Board Policy No. 5144 and Staff Rule No. 5144 would have a "primary effect" of advancing religion. Such view is implicit when they state that "[t]he 'primary effect' test bespeaks not only of financial assistance[4] but also necessarily inquires whether the consequence of state action is to place its imprimatur upon the religious activity [Citations.]" In effect, the majority have said it is impermissible because it is impermissible. They make no serious attempt to inquire into whether the activity in question might be accommodation under the *Zorach* concept as distinguished from sponsorship under *McCollum*, *Engel* and *Abington*, where sponsorship was tantamount to affirmatively requiring the activity which was stricken down.

As a consequence of the underlying basis for the distinction noted between *Zorach* and the other cases, I suggest on the facts of the stipulation that it would be more logical to characterize what is sought here by plaintiffs as accommodation. On the facts, the defendant school district, for more than 15 years, has not defined factually what it means to recognize these clubs. In addition, in January of 1974, it took action to allow the plaintiffs to proceed informally with their religious activities. From this I perceive that there was nothing anticipated by the non-lawyers then involved, or by

---

[4]The free use of a classroom and the availability of heat and light

the other students, or by the parents of other students which would cause any commotion. The "recognition" sought here on the face of it was and is both peripheral and innocuous in terms of the school district's involvement. Actually, in practical result, it is very little different from what was countenanced by the order of January 8, 1974, before arrival of the legal opinion of the county counsel which I suspect no one welcomed. Anyway, perhaps this effort to argue by deduction is flaying the obvious, but it seems to me that when a factual question is as close as this one is, there is surely merit in giving some weight to the non-legal objectives initially found acceptable by the parties on both sides.

In sum, therefore, reviewing the facts as contained in paragraph 18 of the stipulation and noting the contents of Board Policy No. 5144 and Staff Rule No. 5144, I would hold that the recognition here sought by the plaintiffs would result only in an *accommodation* of the religious views and activities of the plaintiffs as permitted under *Zorach v. Clauson,supra,* 343 U.S. 306, and would not be impermissible *sponsorship* which I construe under the cases to mean affirmatively to require the religious activity challenged.

As a postscript to this portion of the dissent, I must respectfully observe that the kind of "divisiveness" which the majority foresees here has only been noted in those cases where the religious activity has been in some manner required. It is logically difficult to imagine how a completely voluntary program could be divisive.

* * * * *

The second ground on which I dissent from the result reached by the majority invokes the rights of plaintiffs under

the Free Expression Clause, First Amendment, as well as the Equal Protection Clause, Fourteenth Amendment, United States Constitution. This calls up for notice three comparatively recent decisions of the United States Supreme Court. *Tinker v. Des Moines Independent Com. Sch. Dist*, 393 U.S. 503 [21 L. Ed. 2d 731, 89 S. Ct. 733], holds that the rights to free expression guaranteed by the First Amendment are not shed by students when they cross the thresholds of the public schools. *Healy v. James*, 408 U.S. 169 [33 L. Ed. 2d 266, 92 S. Ct. 2338], held that public schools which maintain an ongoing program of recognizing student organizations that includes allowing student groups so recognized to use school facilities for meetings (Cf. Board Policy No. 5144 and Staff Rule No. 5144) cannot deny such recognition and use of school facilities on the basis of the subject of the proposed student activities. *Police Department v. Mosley*, 408 U.S. 92 [33 L. Ed. 2d 212, 92 S. Ct. 2286], extended the concept announced in *Healy*, decided the same day, and held that the government may not establish a public forum for the communication of ideas and then deny access to that forum on the basis of what is to be said.

In the light of these precedents, it can be logically urged that a public school district which recognizes student clubs and allows them the use of school facilities for meetings and communication purposes may not single out those student groups with religious interests and solely on that basis deny to those groups recognition where the result also is to deny them the use of meeting rooms and communication facilities equivalent to those granted to other student groups.

While *Healy* involved the efforts of the Students for a Democratic Society (SDS) to secure a forum at a Connecti-

cut State College, and while *Mosley* involved the action by a solitary postal employee in picketing a school and carrying a sign accusing it of racist policies which led to his conviction under a Chicago ordinance which forbade picketing of schools *except in labor disputes,* the decision in *Tinker* on its facts comes close to what is involved in the case at bench.

In *Tinker* the school sought to expel certain of its students who, in violation of a school regulation, wore black armbands on the school campus to express their disapproval of the Vietnam War. The students sought an injunction against enforcement of the regulation, and their complaint was dismissed by the United States District Court. The Court of Appeals, Eighth Circuit, affirmed without opinion. The United States Supreme Court reversed, and where there was an absence of any determination of facts which might reasonably have led school authorities to foresee substantial disruption of the school's operations, observed, "[c]learly, the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible. . . . Students in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. . . . The principal use to which the schools are dedicated is to accommodate students during prescribed hours for the purpose of certain types of activities. *Among those activities is personal intercommunication among the students.*" (*Tinker v. Des Moines Independent Com. Sch. Dist., supra,* 393 U.S. 503, 511, 512; emphasis added.)

Similarly, in *Garvin v. Rosenau,* 455 F.2d 233, the Court of Appeals, Sixth Circuit, reversed the United States District Court which had dismissed the plaintiffs' complaint arising from a refusal of a public school to recognize a chapter of the Student Mobilization Committee on the ground that it violated a school policy against student clubs which adhered to partisan points of view. This was in a context similar to that prevailing at Huntington Beach in that the school maintained an ongoing program of recognizing student clubs.

In the case now before us, the defendant district has itself determined that an ongoing program of student organizations is an appropriate forum for the discussion of ideas at its school. It cannot now deny that forum to plaintiffs on the basis of the subject matter of the ideas to be discussed. Had it not created that forum, plaintiffs would have no claim to use public property for Bible study purposes. (Cf. *Hunt v Board of Education of County of Kanawha,* 321 F. Supp. 1263, in which student prayer not connected with an ongoing student club program or any other school-established forum was held by a federal judge not to be privileged.) But the district has created an ongoing student club program, and the cases cited clearly show that these plaintiffs may not be excluded from the forum thus created unless, of course, the First Amendment which includes a guarantee of religious liberty is somehow construed so that religion is the one subject not protected by the freedom of a public forum.

The liberties of expression and association, the freedom of a public forum, and the right to the equal protection of the laws are in a sense all of a single fabric which is the fabric of free and equal communication involving the right

to *receive* communication as well as the right to *impart* communication. This right of communication has a value to weigh on the scales against whatever Establishment Clause value is involved in allowing these students to use an empty school room for Bible discussion purposes just as other students are allowed to use other empty rooms for secular discussion purposes.

What is the value of these communication rights? It might be argued that to deny these students the privilege of studying the Bible during lunch hour does not completely destroy their right to communicate. It only eliminates one subject matter, leaving communication perfectly open on all other subjects. Thus, the argument goes, there is not *really* much of an infringement upon communication. A not dissimilar argument was made in *Thomas v. Collins*, 323 U.S. 516 [89 L. Ed. 430, 65 S. Ct. 315], wherein a national labor union officer was held in contempt of an ex parte restraining order enjoining him from soliciting union members without first registering with the state. It was argued that it was a small thing to ask him to register. The court replied, "[t]he restraint is not small when it is considered what was restrained" and held that in weighing the value of First Amendment freedoms against the right of a state to exercise the police power, "it is the character of the right, not of the limitation" which is placed upon the scales of justice. (*Id.* at pp. 543, 530.)

To conclude this portion of my dissent, I can do no better than to defer to the comments of counsel for the plaintiffs who observes, "[t]he practical realities are that if students are to communicate with students on any subject they must do so where students come together: at school!

[Paragraph.] On one side of the scale is an empty school room. Being empty, it would hardly move the scale even if it were being balanced against nothing, especially since there is no governmental purpose other than to be fair, grant equality and give an opportunity for student intercommunication. On the students' side of the scale there is to be weighed almost every one of the freedoms that are most valued by our nation's fundamental laws."

* * * * *

Before proceeding to a more fundamental quarrel with the constitutional authorities relied upon by the majority, it is necessary to dispose of the possibility that the recognition here sought would run afoul of the California Constitution. Without attempting to weave an argument that the provisions of the California Constitution, if deemed to forbid what is sought, would be void under the United States Constitution, a good case can be made that the activity which plaintiffs want recognized is not prohibited by the California Constitution.

Article XVI, section 5 of the California Constitution, formerly Article XIII, section 24,[5] provides in pertinent part, "Neither the Legislature, nor any county, . . . or other municipal corporation, shall ever make an appropriation, or pay from any public fund whatever, or grant anything to or in aid of any religious sect, church, creed, or sectarian purpose . . ." This section has been characterized by the Attorney General of California as "the definitive statement of the principle of

---

[5] Article 13, section 24, formerly Article 4, section 30, which prohibited appropriation of public funds in aid of religious purposes or institutions, was repealed November 5, 1974. Article 16, section 5 was added to the Constitution on the same day.

government impartiality in the field of religion." (37 Ops. Cal. Atty. Gen. 105, 107.) It has been held under this section, that even if a statute has some identifiable secular objective, such fact will not immunize it from analysis to determine whether it also has the direct, immediate, and substantial effect of advancing religion. (*Frohliger v. Richardson*, 63 Cal. App. 209, 217.) In *Frohliger*, the court struck down a statute appropriating money for the restoration of the San Diego Misson although it concluded that secular (i.e., historical and cultural objectives), as well as religious ends, were aided by the statute.

However, this "section has never been interpreted . . . to require governmental hostility to religion, nor to prohibit a religious institution from receiving an indirect, remote, and incidental benefit from a statute which has a secular primary purpose. [Citation.]" (*California Educational Facilities Authority v. Priest*, 12 Cal. 3d 593, 605.)

In the case just cited, the state treasurer declined to proceed with the steps necessary to sell certain bonds authorized by the Educational Facilities Authority Act. (Ed. Code, § 30301 et seq.) Her reason for doing so was because questions had been raised concerning the constitutionality of the Act under then Article XIII, section 24. The "Authority," along with the University of the Pacific, sought a writ of mandate to compel the treasurer to proceed as called for by the Act. The Supreme Court issued the writ, holding that the Act neither violated the Establishment Clause of the First Amendment of the United States Constitution, nor the state constitutional proscription already noted.

In the course of the opinion, Justice Mosk states "[t]he benefits of the Act are available to all nonpublic institutions

of higher education in the state, whether sectarian or nonsectarian." (*Id.* at p. 601.) Invoking *Hunt v. McNair*, 413 U.S. 734 [37 L. Ed. 2d 923, 93 S. Ct. 2868] Justice Mosk continues, " . . . in evaluating the 'primary effect' of the legislation in [the cited case], the court reiterated its prior rejection of the argument, also advanced by respondent here, that all governmental assistance to a sectarian organization is forbidden under the establishment clause 'because aid to one aspect of an institution frees it to spend its other resources on religious ends.' [Citation.] Rather, a state may constitutionally 'provide church-related schools with secular, neutral, or nonideological services, facilities, or materials.' (*Lemon v. Kurtzman* (1971) . . . 403 U.S. 602, 616 [29 L. Ed. 2d 745, 757-758].)" (*California Educational Facilities Authority v. Priest, supra*, 12 Cal. 3d 593, 601.)

Accordingly, if the state can permissibly lend the massive power of its treasurer in aid of a sectarian institution to help finance the construction of educational facilities, it seems that to allow a group of high school students to use school rooms to discuss the Bible is well within the rule quoted. As stated further by Justice Mosk, "[t]here can be no claim in the instant case that the proposed project runs afoul of this test. As noted, the University of the Pacific is not affiliated with any religious organization. *But even if it were, neither the Act nor the proposed project would have the impermissible primary effect of advancing religion.*" (*Id.* at p. 601; emphasis added.)

So it can be observed here. Surely, to allow the plaintiffs to sit in a classroom at Edison High School and discuss the Bible in the presence of a faculty member, present to keep order if needed, cannot seriously be regarded as importing an

action by the district to "grant anything to or in aid of any religious sect . . . " (Cal. Const., art. XVI, § 5.)

* * * * *

It remains to give vent to what has increasingly troubled me about the trend of the decisions purporting to construe and apply the Establishment Clause. It is certainly not because of any arrogant delusions of Delphic prescience that I voice the lament which follows, but rather because I have long been awaiting this chance to express a deep concern which hopefully will fall upon interested ears and then be equally shared. What follows is a plea similar to that made by those valiant and persistent heroes[6] of almost 25 years ago, a plea which led to their triumph in *Brown v. Board of Education of Topeka*, 347 U.S. 483 [98 L. Ed. 873, 74 S. Ct. 686]. By that I mean to imply that constitutional pronouncements have no claim to immortality. Times change and previously obscured wisdom emerges. In *Brown*, the United States Supreme Court was finally persuaded by essentially sociological and psychological wisdom which had at last gained widespread acceptance among our citizenry that the "separate but equal" facilities doctrine as applied to schools for children of minority birth was untenable against the admonition of the Fourteenth Amendment that all persons shall enjoy equal protection of the laws.

In an analogous mode, I see the necessity for a re-evaluation of the cases construing the Establishment Clause. With due respect for the sincerity of those who have authored the cases relied upon by the majority, it seems to me that their sweeping interpretations of the simple phrase that "Congress

---

[6]See Kluger, *Simple Justice* (1976)

shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . " (U. S. Const., Amend. I) have distorted all out of rational proportion both what the framers of the Constitution intended and what is fundamental to the survival of an ethical society. To give meaning and substance to this call for a change in the trend of the cases, I have chosen to quote extensively from an essay written by Frank Goble[7] for dissemination by the Thomas Jefferson Research Center of Pasadena, California.[8]

The essay, as a kind of text to build on, sets forth the following thought: "When a society is perishing, the true advice to give to those who would restore it is to recall it to the principles from which it sprung." Mr. Goble then proceeds.

"Russell Kirk is the author of a magnificent volume entitled 'The Roots of American Order.' It ought to be required reading in our schools and for everyone concerned about our society. The book traces the ideas from Egypt, Greece, Italy (Rome), Europe and other nations that became, in the creative minds of the Founding Fathers, the basis for the most successful society in history.

" 'Upon the classical and theological virtues,' writes Dr. Kirk, 'upon the social experience of the old world and the new, there was built by self-sacrifice and high imagination

---

[7]I do not know Mr. Goble, but I have heard him s[illegible]k. My reason for choosing Mr. Goble's essay is that anyone would be hard pressed to improve upon his exposition of the points he makes which are the points I wish to make. The essay is not quoted in its entirety, but has been edited without sacrificing its thrust.

[8]The Thomas Jefferson Research Center is a non-profit corporation organized in 1963 for multi-disciplinary applied human research. The organizers were concerned over an increase in social problems and have sought to determine if the problem-solving methods of professional management could be successfully applied to the solution of human problems.

the intricate structure of personal and public order. Although no single human mind planned this order of ours, the wisdom and the toil of countless men and women have gone into its making.'

"It seems obvious [despite this] that something is seriously wrong . . . [A]t a time when we are spending more than ever on education, we see proliferating strikes by teachers, increasing violence and vandalism, and high school 'graduates' who are functionally illiterate. [O]n every level, our society is witnessing an alarming increase in irresponsible behavior.

"Systems, social or mechanical, function when the various parts are in order. Your auto mechanic, if he is a good one, knows why your car works. He has a mental image of a well-functioning automobile. But when your car doesn't operate, you don't want the mechanic to tell you about a well-functioning car, you want him to find out what's wrong and repair it.

"The same reasoning can be applied to our society. We need to understand the fundamental ideas that made our society great—Dr. Kirk has given us an excellent explanation of this. Then, if we are to recover our greatness, we must identify what has gone wrong and correct it. Thus, the urgent question becomes, what are the roots of American Disorder?

WHAT IS WRONG?

" . . . It is our opinion . . . that a basic cause for our society's exploding problems is personal and organizational irresponsibility. Irresponsibility is a social disease that, if left untreated, destroys individuals, families, communities, and nations. The world is littered with the ruins of societies destroyed by irresponsibility . . . .

"What causes irresponsible human behavior? Moral ignorance! Why is moral ignorance increasing in a society

which is spending more for education each year and more on education as a percentage of its total production than any other society in history? Walter Lippmann explained it quite succinctly years ago when he said, 'During the past 40 or 50 years, those who are responsible for education have progressively removed from the curriculum of studies, the Western culture which produced the modern democratic state. The schools and colleges have, therefore, been sending out into the world, men who no longer understand the creative principles of the society in which they must live. The prevailing education is destined, if it continues, to destroy Western civilization and is, in fact, destroying it.'

"There is more than enough evidence to prove that American education at all levels has indeed placed less and less emphasis on the cultural principles that provided the foundation for our national success. Dr. Benjamin D. Wood, former Director of the Bureau of Collegiate Education Research at Columbia University described it as, 'The lamentable disengagement of American education from its indispensable role in the moral, ethical realm which arose from a grieviously erroneous interpretation of the wise separation of church and state, which error in turn grew out of an older and unfortunately still widely-accepted error of confusing morality and ethics with one or another specific ecclesiastical affiliations' . . .

"John Nietz did a study of old textbooks and found that originally moral education was one of the principal objectives of our schools. According to Mr. Nietz, before 1775, religion and morals accounted for over 90 per cent of the content of school readers. By 1926, this was down to 6 per cent, and it is doubtless far less today, perhaps too small to be measured.

"Mr. Nietz says that to understand the decline of moral

values and the rise in vandalism and crime we need only to contrast the content of the McGuffey readers (first published in 1836-57) with the 'literature' inflicted on children today.

"Mr. Nietz says about the McGuffey readers: 'Such moral qualities as honesty, truth and truthfulness, obedience, temperance, kindness to humans and animals, thrift, work and patriotism were largely taught by means of actual human and situational stories . . . It has been recognized by students of history that the lessons in the McGuffey readers did much to set the standards of morality and of the social life in the pioneering West for more than half a century. Many of the truths and poetic expressions memorized from these readers were quoted by parents, preachers and others to counter acts of intemperance, vulgarity, laziness, brutality, dishonesty and lawlessness, which were altogether too common among frontier people . . . Many distinguished Americans who were reared west of the Appalachians . . . have acknowledged the deep debt they owe to the lessons learned from these readers.' . . .

"I could give many other examples to show that there has been a very substantial decline in educational emphasis on the moral and ethical concepts that provided the basis for American order. Educators have not merely de-emphasized our cultural heritage, in many cases they have taught that it is obsolete–some suggest that it was never valid. . . .

"If moral principles form the roots for American order, then moral relativism (the denial of moral principles) must form the roots of disorder. If this is the situation, how did it occur? How and why did our educational system shift from an emphasis on moral principles to an avoidance or even denial of principles? (In defense of our educational system it should be pointed out that most American have permitted, or at least

have not often objected to, this trend.)

"The answer, I am convinced, lies in an understanding of the behavioral sciences and their steadily increasing influence since about 1870. Dr. Willis Harman, former Director of one of the U. S. Office of Education's Educational Policy Research Centers, concurs. 'The religious tenets which form the undergirding of the values of the society,' he states, 'as well as for the overarching national purpose, reeled under the successive blows of the paleontologists, the evolutionists, psychoanalysts, and the positivistic behavioral scientists. By a half century ago or so they had been eroded away to such an extent that the society's value structure was, as it were, left hanging without support.'

"Abraham Maslow identified the behavioral sciences as playing a major role–perhaps the major role–in causing the declining emphasis on moral principles and individual responsibility in our schools.

" 'The ultimate disease of our time is 'valuelessness,' he stated, ' . . . this state is more crucially dangerous than ever before in history . . . It becomes more and more clear that the study of crippled, stunted, immature, and unhealthy specimens can yield only a crippled psychology and a crippled philosophy. The study of self-actualizing people must be the basis for a more universal science of psychology.' . . .

"A society cannot continue to exist without a workable system of values. 'Moral decay,' writes Charles Brough, in The Cycle of Civilization, 'has generally been a characteristic facet of every declining civilization.'

"One of the most widely read history books of all times is The Decline and Fall of the Roman Empire written in 1788 by Edward Gibbons. He set forth five basic reasons why that

great civilization withered and died. These were:

"The undermining of the dignity and sanctity of the home which is the basis for human society.

"Higher and higher taxes; the spending of public money for free bread and circuses for the populace.

"The mad craze for pleasure; sports becoming every year more exciting, more brutal, more immoral.

"The building of great armaments when the real enemy was within—the decay of individual responsibility.

"The decay of religion; faith fading into mere form, losing touch with life, losing power to guide the people.

" 'In studying the breakdowns of civilizations,' states Arnold Toynbee, 'we found that the cause was, in every case, some failure of self-determination, and that, when human beings thus lost control over their own destinies, this social disaster usually turned out to have been the consequence of a moral aberration.' At another time Toynbee wrote, 'I do not believe that civilizations are fated to break down, or that they have a fixed maximum life span . . . I do not believe either that civilizations break down through being worsted by their environment. I believe that, when they do break down, the cause is, not some blow from outside, but some inward spiritual failure—some kind of demoralization to which we human beings are not bound to succumb and for which we ourselves therefore bear the responsibility . . . '

"The roots of American disorder can be found in our institutions of education in the social and behavioral disciplines The dominant theories here have been inconsistent with and sometimes antagonistic to our traditions and tend to discourage individual responsibility. . . . "

* * * * *

To what has been quoted, particularly, " '[t]he lamentable disengagement of American education from its indispensable role in the moral, ethical realm which arose from a *grieviously erroneous interpretation* [emphasis added] of the wise separation of church and state . . . grew out of an older and unfortunately still widely-accepted error of confusing morality and ethics with one or another specific ecclesiastical affiliations,' " I would add that the "lamentable disengagement" noted has been aided and abetted every step of the way by a persistent and increasingly portentous rhetoric in the decisions of the United States Supreme Court whose authors fail to perceive the difference on the one hand between the prohibitions against the establishment of a state religion (which is all of an affirmative nature that the Establishment Clause was really ever intended to *prohibit*)[9] and on the other the countenancing of school teachers teaching theological, ethical, and moral concepts from all possible points of persuasion. What this has led to is a tyranny of the minority. The many teachers who share the views of Mr. Goble as above expressed are afraid to voice them, while those teachers who discount the moral and ethical foundations of our national heritage are free in the classroom to denounce that heritage with impunity.

Therefore, let there be a start on the road back, just as there was in *Brown v. Board of Education of Topeka, supra,* 347 U.S. 483, in the field of school segregation. In this area, let there emerge a rule of constitutional decision which clearly supports the accommodation concept announced in *Zorach v. Clauson, supra,* 343 U.S. 306. Such a rule should

[9] Actually, it seems that the latter portion of the admonition of the Establishment Clause has been wholly overlooked, i.e., where it says that "Congress shall make no law . . . prohibiting the free exercise [of religion]."

also make it plain that locally formulated curricula recognizing and implementing the need for moral and ethical training of school pupils not only are permissible but are to be encouraged.[10]

I would reverse the judgment and direct the trial court to grant the relief prayed for.

CERTIFIED FOR PUBLICATION.

McDANIEL,
J.

---

[10]Lest this tract be construed by anyone to be an artfully disguised effort to promote and advance the teachings of the Bible, let it be known that I am an ardent and practicing Buddhist and a member of the Nichiren Shoshu Soka Gakkai.

DENIAL OF PETITION FOR REHEARING

In the Court of Appeal, State of California, Fourth Appellate District, Division Two.

4 Civ. No. 15738, County No. 228389.

BRUCE JOHNSON, et al., Appellants, vs. HUNTINGTON BEACH UNION HIGH SCHOOL DISTRICT, et al., Respondents.

[FILED MAR 30 1977]

BY THE COURT:

The petition for rehearing is DENIED.

Justice McDaniel is of the opinion that the petition should be granted.

TAMURA, J.,
Acting P.J.

Copies to:

County Clerk, County of Orange, Courthouse, Santa Ana 92701

Kenneth A. Roberts, 210½ Main St., Huntington Beach 92648

Rutan & Tucker, 401 Civic Center Dr. West, Santa Ana 92702

David A. Lehrer, 6505 Wilshire Blvd., Suite 814, L.A. 90048

DENIAL OF RELIEF FROM DEFAULT

OFFICE OF THE CLERK
SUPREME COURT OF CALIFORNIA
SAN FRANCISCO, CALIFORNIA
G. E. BISHEL, CLERK
415—557-0557

April 25, 1977

Kenneth A. Roberts, Esq.
210½ Main Street
Huntington Beach, California 92648

Re: 4 Civ. 15738 - Johnson v. Huntington Beach High School District

Dear Mr. Roberts:

Your application for relief from default and petition for hearing were presented to the court for its consideration.

The court directed that your petition for hearing be returned for the reason that the requested order to permit the untimely filing would not issue. The court seldom accedes to such requests and miscalculation of rule time does not constitute "good cause" to grant the relief. Your $25.00 check is also enclosed.

Very truly yours,

G. E. BISHEL
Clerk of the Supreme Court

By: J. L. Kavanagh
Chief Deputy

JLK:ct
Enclosures
cc: Messrs. Rutan & Tucker
David A. Lehrer, Esq.

PETITION REQUESTING COURT TO GRANT HEARING ON ITS OWN MOTION, PURSUANT TO CALIFORNIA RULES OF COURT, RULE 28(a), AND DECLARATION IN SUPPORT THEREOF. POINTS AND AUTHORITIES.

In the Supreme Court of the State of California.
4TH Civil NO. 15738
BRUCE JOHNSON, a minor, by Earl D. Johnson, etc., et al., Plaintiffs and Appellants, vs. HUNTINGTON BEACH UNION HIGH SCHOOL DISTRICT, et al., Defendants and Respondents.

[RECEIVED MAY 6 1977
Clerk Supreme Court]

I, KENNETH A. ROBERTS, am an attorney licensed to practice in the State of California. I am attorney of record in the above entitled matter, and request and declare as follows:

A petition for hearing before the State Supreme Court, in this matter, was filed one day late and relief from default was denied, stating inadvertance of attorney was not good cause for relief.

Due to the unusual nature of the case and the resulting circumstances subsequent to the opinion of the Appellate Court, this petition is submitted requesting the Supreme Court to exercise its power to review the decision of the Appellate Court on its own motion under the provisions of Rule 28(a) of the California Rules of Court, for the following reasons:

1. The rights and limitations of students on high school and college campuses, to gather together, on campus, voluntarily

for bible study and prayer, during free time such as lunch and non-class hours is being denied by the school authorities. School authorities are basing their decisions on the Attorney General's opinion and on the Appellate Court decision in the instant case, and existing school regulations regarding clubs and "organizations" on campus. The students and the school districts are now caught in the dilemma of where to draw the line as to what is allowable and what is not allowable as far as religious expression on campus.

The decision of the Appellate Court and the Attorney General's opinion have failed to provide the needed guidelines as to where to draw the line to such a degree that the school districts on both high school and college campuses are now denying any activity at all of group religious activity on campus either formal or informal by students.

2. The issues involved relate to a Federal question concerning primarily the establishment clause of the United States Constitution, on which the courts of California have made no prior decisions, and are of such importance as to deserve consideration by this Court based on the California Constitution to provide the needed guidelines for both students and school districts to prevent future litigation of the same issues.

3. A resolution of the very basic foundational issue of what expression of religious freedom is allowable on school campuses in California within the context of the California Constitution is needed to prevent further litigation in search of such a guideline.

As such, I request this Court to review the decision of the Appellate Court, and further to provide interpretation of said Appellate Court decision which will provide guidelines

for both students and school authorities which will both allow and limit religious expression within the meaning of the California Constitution with sufficient clarity to dispose of the need for future litigation on the same issues.

I declare under penalty of perjury that the foregoing is true and correct. Executed on May 2, 1977 in Huntington Beach, California.

KENNETH A. ROBERTS
Attorney for Plaintiffs and Appellants

POINTS AND AUTHORITIES

The power to order a hearing on its own motion is rarely exercised; it is chiefly invoked to allow consideration of an unauthorized or belated petition.

Witkins California Procedure 2nd Volume 6
page 4532.

Supreme Court will order cause transferred within 60 days after decision of district court of appeal, notwithstanding rule requiring petition for rehearing to be filed within 10 days after judgment of District Court has become final.

Hygienic Health Food Company vs. Grant,
188 Cal. 131, 204 P. 389.

Within 30 days after a decision of a District Court of Appeal becomes final as to that court, the Supreme Court, on its own motion, may order the cause transferred to itself for hearing and decision, and within the original 30-day period the Supreme Court may for good cause extend the time not to exceed an additional 30 days.

California Rules of Court, Title I, Div. I,
Rule 28(a).

Respectfully submitted,

KENNETH A. ROBERTS

Attorney for Appellants

Proof of Service by Mail attached showing service:
Clerk, Court of Appeal, Fourth Appellate District,
640 State Bldg., 303 W. 3rd St., San Bernardino,
California 92401;
County Clerk, County of Orange, 700 Civic Center
Drive West, Santa Ana, California 92701;
Office of the Clerk, Supreme Court of California,
4250 State Building, 350 McAllister Street,
San Francisco 94102;
Rutan & Tucker, 401 Civic Center Drive West, Santa
Ana, California 92702; and
David A. Lehrer, 6505 Wilshire Blvd., Suite 814, Los
Angeles, California 90048.
Executed May 3, 1977, at Huntington Beach, California,
by Aldora L. Thackeray.

Original and seven copies of above document forwarded to Supreme Court of California, together with letter dated May 3, 1977, indicating: "Also enclosed is the original and fourteen copies of Petition for Hearing which I am enclosing in the event my request is granted, and a check for $25.00 filing fee if needed. . . ." Signed: Kenneth A. Roberts.

LETTER DATED MAY 12, 1977

OFFICE OF THE CLERK
SUPREME COURT OF CALIFORNIA
SAN FRANCISCO, CALIFORNIA
G. E. BISHEL, CLERK
415—557-0887

Kenneth A. Roberts, Esq.
210½ Main Street
Huntington Beach, California 92648

Re: 4 Civ. 15738 - Johnson v. Huntington Beach
Union High School District

Dear Mr. Roberts:

At the direction of the court, we return herewith original and copies of a petition for hearing received on May 6, 1977. The petition was sixteen days late.

Except in extraordinary circumstances the court has not deemed miscalculation of time or the press of business as good cause for relief from default.

We also return your check in the amount of $25.00.

Very truly yours,

G. E. BISHEL

GEB:ct
Enclosures
cc: Messrs. Rutan & Tucker
David A. Lehrer, Esq.

Clerk of the Supreme Court

STATE OF CALIFORNIA)
) ss.
County of Orange)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Orange, State of California, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 326½ Main Street, Huntington Beach, California 92648, that on JUNE 7th, 1977, I served the within PETITION FOR A WRIT OF CERTIORARI (BRUCE JOHNSON, etc., et al. vs. HUNTINGTON BEACH UNION HIGH SCHOOL DISTRICT, et al) on the following named parties by depositing the designated copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Huntington Beach, California, addressed to said parties at the addresses as follows:

Clerk, Court of Appeal
Fourth Appellate District
640 State Bldg., 303 W. 3rd St.
San Bernardino, Ca. 92401
No. 15738 [1 copy]

County Clerk, County of Orange
700 Civic Center Drive West
Santa Ana, California 92701
No. 228389 [1 copy]

Rutan & Tucker
401 Civic Center Drive West
Santa Ana, Ca. 92702
[2 copies]

David A. Lehrer
6505 Wilshire Blvd.
Suite 814
Los Angeles, Ca. 90048
[1 copy]

I declare under penalty of perjury that the foregoing is true and correct.

Executed on JUNE 7th, 1977, at HUNTINGTON BEACH, CALIFORNIA.

D. A. Standefer

Dean-Standefer, 326½ Main St., Huntington Beach, Ca. 92648
(714) 536-7161

Supreme Court, U. S.
FILED
SEP 16 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1976

No. 76-1739

BRUCE JOHNSON, a minor, by Earl D. Johnson, *etc.*, *et al.*,

Petitioners,

vs.

HUNTINGTON BEACH UNION HIGH SCHOOL DISTRICT, *et al.*,

Respondents.

SUPPLEMENTAL BRIEF OF PETITIONERS ON PETITION FOR WRIT OF CERTIORARI

Of Counsel:

KENNETH A. ROBERTS
210½ Main Street
Huntington Beach, Ca. 92648
Telephone - (714) 536-6559

THOMAS M. WHALING
218 Main Street
Huntington Beach, Ca. 92648
Telephone - (714) 536-8841

Attorney for Petitioners

Dean-Standefer, 326½ Main St., Huntington Beach, Ca. 92648 - (714) 536-7161

TOPICAL INDEX

Supplemental Brief of Petitioners on Petition for Writ of Certiorari **Page**

Argument 1

Although petitioners failed to timely petition for a hearing in the California State Supreme Court, the petitioners have met the jurisdictional requirement that a decision be the decision of the highest court of the state in which a decision "could" be had 1

Conclusion 7

TABLE OF AUTHORITIES CITED

Cases

American Railway Express v. Levee, 263 U.S. 19, 44 S. Ct. 11, 68 L. Ed. 140 (1923) 3

Bacon v. Texas, 163 U.S. 207, 16 S. Ct. 1023, 41 L. Ed. 132 (1896) 4

Chicago and E.I.R. Co. v. Industrial Com., 284 U.S. 296, 52 S. Ct. 151, 76 L. Ed. 304 (1932) 3

Fisher v. Perkins, 122 U.S. 522, 7 S. Ct. 1227, 30 L. Ed. 1192 (1887) 5

Gregory v. McVeigh, 90 U.S. 294 [23 Wall 294] (1875) 3

Gorman v. Washington, 316 U.S. 98, 62 S. Ct. 926, 86 L. Ed. 1300 (1942) 5

TABLE OF AUTHORITIES CITED

Cases (cont'd)	Page
Gotthilf v. Sills, 375 U.S. 79, 84 S. Ct. 187, 11 L. Ed. 2d 159 (1963)	5
Hammerstein v. Superior Court of California, 341 U.S. 491, 71 S. Ct. 820, 95 L. Ed. 1135 (1951)	4
Henry v. Mississippi, 379 U.S. 443, 85 S. Ct. 564, 13 L. Ed. 2d 408 (1965)	4
Interstate Circuit, Inc. v. Dallas, 390 U.S. 676, 88 S. Ct. 1298, 20 L. Ed. 2d 225 (1968)	3
Minneapolis, St. P. and S.S.M. R. Co. v. Rock, 279 U.S. 410, 49 S. Ct. 363, 73 L. Ed. 766 (1929)	3
Missouri, K. and T.R. Co. v. Elliott, 184 U.S. 530, 22 S. Ct. 446, 46 L. Ed. 673 (1902) ..	4
Nash v. Florida Industrial Com., 389 U.S. 235, 88 S. Ct. 362, 19 L. Ed. 2d 438 (1967)	2
Stanford v. Texas, 379 U.S. 476, 85 S. Ct. 506, 13 L. Ed. 2d 431 (1965)	2. 4
Stratton v. Stratton, 239 U.S. 55, 36 S. Ct. 26, 60 L. Ed. 142 (1925)	5
United States v. Healy, 376 U.S. 75	6
United States Constitution	
First Amendment	4
Fourteenth Amendment	4

TABLE OF AUTHORITIES CITED

United States Code	Page
28 U.S.C. § 1257 .... 1, 2, 3, 4, 5, 7	
California Rules of Court	
Rule 24	6
Rule 28(a)	6

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-1739

BRUCE JOHNSON, a minor, by Earl D. Johnson, *etc.*, *et al.*,

Petitioners,

vs.

HUNTINGTON BEACH UNION HIGH SCHOOL DISTRICT, *et al.*,

Respondents.

SUPPLEMENTAL BRIEF OF PETITIONERS ON PETITION FOR WRIT OF CERTIORARI

ARGUMENT

Although Petitioners Failed To Timely Petition For A Hearing In The California State Supreme Court, The Petitioners Have Met The Jurisdictional Requirement That A Decision Be The Decision Of The Highest Court Of The State In Which A Decision "Could" Be Had.

Section 1257 of Title 28 of the United States Code

provides in relevant part:

> "Final judgments or decrees rendered by the highest court of the state in which a decision could be had, may be reviewed by the Supreme Court, as follows: . . . By writ of certiorari . . . . "

This Honorable Court has consistently over the years held that it is within its jurisdiction to review a case in which the decision of an intermediate court is the highest court of the state in which a decision "could" be had. (See, *e.g., Stanford v. Texas,* 379 U.S. 476, 85 S. Ct. 506, 13 L. Ed. 2d 431 (1965), and *Nash v. Florida Industrial Com.,* 389 U.S. 235, 88 S. Ct. 362, 19 L. Ed. 2d 438 (1967)). The petitioners before this Honorable Court, although being one day late in filing a Petition For Hearing before the California Supreme Court (which said petition was refused), by filing a Petition For Relief From Default (which said petition was denied) and by filing a petition before the state supreme court to grant a hearing on its own motion (which said petition was refused), exhausted every possible route in gaining a hearing before said supreme court. In effect and in fact, therefore, the Court of Appeal, being the intermediate court in this case, is the highest court in which the petitioners "could" gain hearing and a decision. Furthermore, by its denying a timely Petition For Rehearing (while taking into account the California Supreme Court's *discretionary* denial of the petitioners' various petitions for review), the Court of Appeal was again rendered as the highest state court in which the petitioners "could" be heard and gain a decision. The Court of Appeal's decision is, therefore, a final decision

that is within this Court's jurisdiction to review pursuant to provisions of 28 U.S.C. § 1257 (see, *e.g., Gregory v. McVeigh,* 90 U.S. 294 [23 Wall 294] (1875)).

On numerous occasions the United States Supreme Court has held that where a case from an intermediate court is denied *discretionary* review by the state supreme court (as in our present case), such fact will not preclude the Court from reviewing the case. In this respect, this Honorable Court in *Interstate Circuit, Inc. v. Dallas,* 390 U.S. 676, 88 S. Ct. 1298, 20 L. Ed. 2d 225 (1968), held that under 28 U.S.C. § 1257 it could review a decision of the Texas Court of Appeals, where the Texas Supreme Court denied "discretionary" review. (Also see, *Chicago and E.I.R. Co. v. Industrial Com.,* 284 U.S. 296, 52 S. Ct. 151, 76 L. Ed. 304 (1932); *American Railway Express v. Levee,* 263 U.S. 19, 44 S. Ct. 11, 68 L. Ed. 140 (1923); and *Minneapolis, St. P. and S.S.M. R. Co. v. Rock,* 279 U.S. 410, 49 S. Ct. 363, 73 L. Ed. 766 (1929).)

The petitioners were specifically notified by the California Supreme Court that their "application for relief from default and petition for hearing were presented to the court for its consideration" and that the state's highest court "directed" that the petition for hearing be denied because of the petitioners' untimely filing (see Appendix "C" to Petition for a Writ of Certiorari). The California Supreme Court, the petitioners were told, "seldom accedes" to such requests, thereby implying that it is within the court's *discretion* to hear the case (see Appendix "C" *supra*). If not, there would seemingly be no reason why the court would allow the petitioners' application for relief from default and petition for hearing

to be presented to it for its "consideration" (Appendix "C" *supra*). If the California Supreme Court does not exercise discretion in such an instance, then such an application would be denied summarily, but this was not the case.

In the petitioners' case there exists a substantial federal question that is of the utmost importance. At stake are the petitioners' rights to the freedoms of speech, association and religion under the First Amendment to the United States Constitution, as well as the equal protection of the laws as guaranteed to the petitioners under the Fourteenth Amendment. In this respect, the United States Supreme Court has repeatedly held, as in *Hammerstein v. Superior Court of California,* 341 U.S. 491, 71 S. Ct. 820, 95 L. Ed. 1135 (1951), that even though the highest court of a state has, upon an adequate ground, refused to review on the merits a judgment of an intermediate appellate court deciding a federal question, the judgment properly before the Court is that of the intermediate appellate court, and is, therefore, reviewable by the High Court. (Also see, *Bacon v. Texas,* 163 U.S. 207, 16 S. Ct. 1023, 41 L. Ed. 132 (1896); *Missouri, K. and T.R. Co. v. Elliott,* 184 U.S. 530, 22 S. Ct. 446, 46 L. Ed. 673 (1902); and *Stanford v. Texas,* 379 U.S. 476, 85 S. Ct. 506, 13 L. Ed. 2d 431 (1965).) Furthermore, the United States Supreme Court has held, as in *Henry v. Mississippi,* 379 U.S. 443, 85 S. Ct. 564, 13 L. Ed. 2d 408 (1965), that a litigant's procedural defaults ought not always be permitted to bar vindication of important federal rights.

Those decisions of the United States Supreme Court which have denied certiorari on the basis of 28 U.S.C.

§ 1257 vary considerably from the petitioners' fact situation. For instance, in *Fisher v. Perkins,* 122 U.S. 522, 7 S. Ct. 1227, 30 L. Ed. 1192 (1887), a decision relied upon by the respondents, the party in that case willfully and deliberately failed (not by inadvertence as in the petitioners' situation) to make application to a superior court for an allowance of an appeal to the court of appeals of Kentucky. Therefore, the Court refused to review the decision of the superior court. This same willful and deliberate refusal by a party to seek review of the state's highest court, again, was the deciding factor in this High Court's unwillingness to exert jurisdiction in the other cases relied upon by the respondents in their Brief in Opposition to Petition for Writ of Certiorari (see, *e.g., Stratton v. Stratton,* 239 U.S. 55, 36 S. Ct. 26, 60 L. Ed. 142 (1925); *Gorman v. Washington,* 316 U.S. 98, 62 S. Ct. 926, 86 L. Ed. 1300 (1942); and *Gotthilf v. Sills,* 375 U.S. 79, 84 S. Ct. 187, 11 L. Ed. 2d 159 (1963)). Moreover, the language of the Supreme Court in *Stratton v. Stratton, supra,* lends weight to the petitioners' contention that the present case is within the reviewable jurisdiction of this Honorable Court (239 U.S. at 56-57):

> "Indeed, conforming to the rule thus thoroughly established, the practice for years has been in the various states where discretionary power to review exists in the highest court of the state, to invoke the exercise of such discretion in order that, upon the refusal to do so, there might be no question concerning the right to review in this court."

It should further be noted that petitioners filed for

hearing before the state supreme court twenty-one days after a timely petition for rehearing was denied on March 30th by the Court of Appeal and eleven days after the date the original decision of the Court of Appeal became final.

The California Rules of Court (Rule 24) make no provisions for extended time, for purposes of petitioning for a rehearing, in setting the time limitations for petition to the state supreme court for hearing. This Honorable Court has clearly made that consideration, by case law in *United States v. Healy*, 376 U.S. 75, wherein it was held that a timely petition for rehearing renders the judgment not final for purposes of appeal until the court disposes of the petition for rehearing. California court rules do not follow this reasoning, and petitioners were burdened with restricted time within which to file their petition after denial of rehearing by the Court of Appeal on March 30, 1977.

Petitioners were limited to twenty days for filing, and made a strong good faith effort to make the filing timely.

After denial of relief from default by filing one day late, petitioners made further effort to expose the merits of the case to the state supreme court by petitioning said court to hear the matter on its own motion, which was within the power and discretion of the court to do so, as provided by Rule 28(a), Rules of Court. Nothing in the court rules restricts petitioners from filing such a petition, as it is within the court's discretion and power to grant such relief. The petition was made on the merits and the serious nature of the constitutional question at issue, and not as a mere boot-strap as alleged by respondents.

CONCLUSION

The intermediate Court of Appeal in this present case is the highest court of the state in which a decision "could" be had pursuant to 28 U.S.C. § 1257. Further, the petitioners contend that the California Supreme Court through its *discretion* denied review of the Court of Appeal's decision. Therefore, it is within this High Court's jurisdiction to grant the petitioners' petition.

Considering the magnitude of the federal question involved in the petitioners' fact situation, it would be within this Honorable Court's just propriety to hear this case since the outcome of this case affects the constitutional rights of countless students across the nation. Such a sacrifice of our precious and essential liberties should not, we submit, be made without this Court's review.

Respectfully submitted,

THOMAS M. WHALING

Attorney for Petitioners

Of Counsel:
KENNETH A. ROBERTS

STATE OF CALIFORNIA)
) ss.
County of Orange)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Orange, State of California, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 326½ Main Street, Huntington Beach, California 92648, that on SEPTEMBER 14 1977, I served the within SUPPLEMENTAL BRIEF OF PETITIONERS ON PETITION FOR WRIT OF CERTIORARI (NO' 76-1739) on the following named parties by depositing the designated copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Huntington Beach, California, addressed to said parties at the addresses as follows:

Clerk, Court of Appeal
Fourth Appellate District
640 State Bldg., 303 W. 3rd St.
San Bernardino, Ca. 92401
No. 15738
[1 copy]

County Clerk, County of Orange
700 Civic Center Drive West
Santa Ana, California 92701
No. 228389
[1 copy]

Rutan & Tucker
401 Civic Center Drive West
Santa Ana, Ca. 92702
[2 copies]

David A. Lehrer
6505 Wilshire Blvd., Suite 814
Los Angeles, Ca. 90048
[1 copy]

I declare under penalty of perjury that the foregoing is true and correct.

Executed on SEPTEMBER 14th 1977, at HUNTINGTON BEACH, CALIFORNIA.

D. A. Standefer

Dean-Standefer, 326½ Main St., Huntington Beach, Ca. 92648
(714) 536-7161

Supreme Court, U. S.
FILED
JUL 7 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1976
No. 76-1739

BRUCE JOHNSON, a minor, by Earl D. Johnson, etc., *et al.*,

Petitioners,

vs.

HUNTINGTON BEACH UNION HIGH SCHOOL DISTRICT, *et al.*,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

RUTAN & TUCKER,
DAVID C. LARSEN,
401 Civic Center Drive West,
Santa Ana, Calif. 92702,
Attorneys for Respondents.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

SUBJECT INDEX

Page

Introduction 1

Jurisdiction 1

Constitutional Provisions and Statute Involved in This Case: Pertinent Parts 2

I

Constitutional Amendments 2

II

Statute of the United States 2

Questions Presented 3

Statement of the Case 4

Summary of Arguments 8

Argument 10

I

Petitioners Failed to Timely Petition for a Discretionary Hearing in the California State Supreme Court and Therefore Failed to Meet the Jurisdictional Requirement That a Decision Be the Decision of the Highest Court of the State in Which a Decision Can Be Had 10

II

The California Court of Appeal for the Fourth Appellate District Correctly Applied Well-Established Precedent of This Court in Determining That Approval and Sponsorship

Page

of Petitioners' Bible Study Club by a Tax Supported High School Is Prohibited by the Establishment Clause of the First Amendment of the United States Constitution 14

A. The Purpose of a Religious Club 23

B. The Primary Effect of Sponsoring Petitioners' Religious Club Would Be to Foster a Sectarian Viewpoint 25

C. Recognition of Appellants' Bible Study Club Would Result in Excessive Entanglement 28

III

The California Court of Appeal for the Fourth Appellate District Correctly Applied Well-Established Precedent of This Court in Determining That Petitioners Were Not Deprived of Any First or Fourteenth Amendment Rights by Respondents' Refusal to Sponsor Their Bible Study Club 32

A. The Denial of Official Recognition to All Religious Clubs Does Not Violate Either the First or the Fourteenth Amendments .. 33

B. The Ban on School-Sponsored Religious Clubs Is Justified by a Compelling State Interest 37

Conclusion 39

Appendix A. Rule 28. Hearing in Supreme Court .....App. p. 1

TABLE OF AUTHORITIES CITED

Cases Page

Abington School District v. Schempp, 374 U.S. 203, 10 L.Ed: 2d 844, 83 S.Ct. 1560 (1963) ..14, 15 .....18, 20, 22, 24, 27, 31, 32, 35, 37

Bob-lo Excursion Co. v. Michigan, 333 U.S. 28, 92 L.Ed. 455, 68 S.Ct. 358 (1948) 38

Cieglar v. Santa Cruz High School Dist., 168 Cal. App. 2d 277, 355 P.2d 709 (1959) 19

Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756, 37 L.Ed.2d 948, 93 S.Ct. 2955 (1973) 16, 26, 27

Cox v. Louisiana, 379 U.S. 536, 13 L.Ed.2d 471, 85 S.Ct. 453 (1963) 35, 37

Danskin v. San Diego Unified School District, 28 Cal. 2d 536, 171 P.2d 885 (1946) 36

Douglas v. California, 372 U.S. 353, 9 L.Ed.2d 811, 83 S.Ct. 814 (1963) 10, 12

Ellis v. Dixon, 349 U.S. 458, 99 L.Ed. 1231, 75 S.Ct. 850, rehearing denied 350 U.S. 855, 100 L. Ed. 759, 76 S.Ct. 37 (1955) 38

Engel v. Vitale, 370 U.S. 421, 8 L.Ed.2d 601, 82 S.Ct. 1261 (1962) 14, 24, 27, 30, 35

Evans v. Selma Union High School District, 193 Cal. 54, 222 Pac. 801 (1924) 31

Everson v. Board of Education, 330 U.S. 1, 91 L.Ed.2d 711, 67 S.Ct. 504 (1947) 15, 31

Fisher v. Perkins, 122 U.S. 522, 30 L.Ed. 1192, 7 S.Ct. 1227 (1887) 10, 11, 12

Page

Gorman v. Washington University, 316 U.S. 98, 86 L.Ed. 1300, 62 S.Ct. 926 (1942) 14

Gotthilf v. Sills, 375 U.S. 79, 11 L.Ed.2d 159, 84 S.Ct. 187 (1963) 10, 11, 13

Gregory v. McVeigh, 90 U.S. 294 (23 Wall.) (1875) 10, 12

Hague v. CIO, 307 U.S. 496, 83 L.Ed. 1423, 59 S.Ct. 954 (1939) 36

Hygienic Health Food Company v. Grant, 188 Cal. 131, 204 Pac. 389 (1922) 5

Kunz v. New York, 340 U.S. 290, 95 L.Ed. 267, 71 S.Ct. .... (1951) 25

Lehman v. City of Shaker Heights, 418 U.S. 298, 41 L.Ed.2d 770, 94 S.Ct. 2714 (1974) 36

Lemon v. Kurtzman, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971) 29, 30

McCollum v. Board of Education, 333 U.S. 203, 92 L.Ed. 649, 68 S.Ct. 461 (1947) .....15, 16, 17 .....18, 20, 21, 22, 25, 32

Meek v. Pittenger, 421 U.S. 349, 44 L.Ed.2d 217, 95 S.Ct. 1753 (1975) 22, 23, 26, 27, 29

Niemotko v. Maryland, 340 U.S. 268, 95 L.Ed. 267, 71 S.Ct. 325 (1951) 25

O'Hair v. Paine, 312 F.Supp. 434 (W.D. Tex. 1969), affirmed per curiam 432 F.2d 66 (5th Cir. 1970), cert. denied 401 U.S. 955 (1971) .. 24

Poulous v. New Hampshire, 345 U.S. 403, 97 L. Ed. 1112, 73 S.Ct. 760 (1953) 35

Reed v. Van Hoven, 237 F.Supp. 48 (W.D. Mich. 1965) 20, 21, 27

Page

Saia v. New York, 334 U.S. 558, 92 L.Ed. 1574, 161 S.Ct. 1148 (1948) 25

Smith v. Smith, 523 F.2d 121 (4th Cir. 1975) 16, 21, 22, 25

Stacey v. William, 306 F.Supp. 963 (N.D. Miss. 1969) 21

State Board of Education v. Board of Education of Netcong, 108 N.J.Super. 564, 262 A.2d 21 (1970), cert. denied 401 U.S. 1013 (1971) .. 35

State ex rel. Greisiger v. Grand Rapids Board of Education, 88 Ohio App. 364, 100 N.E.2d 294, cert. denied 340 U.S. 820, 71 S.Ct. 51, 95 L. Ed. 603, rehrg. denied 341 U.S. 917, 71 S.Ct. 733, 95 L.Ed. 1342 35

Stratton v. Stratton, 239 U.S. 55, 60 L.Ed. 142, 36 S.Ct. 26 (1925) 10, 13

Taylor v. Oakland Scavenger Co., 17 Cal. 2d 594, 110 P.2d 1044 (1941) 19

Walz v. Tax Commission, 397 U.S. 664, 25 L.Ed. 2d 697, 90 S.Ct. 1409 (1970) 23

Whitney v. California, 274 U.S. 357, 71 L.Ed. 1095, 47 S.Ct. 641 (1926) 38

Wood v. Mt. Lebanon Township School District, 342 F.Supp. 1293 (W.D. Pa. 1972) 20

Zorach v. Clauson, 343 U.S. 306, 96 L.Ed. 954, 72 S.Ct. 679 (1951) ....15, 17, 18, 20, 21, 22, 26 .....28, 32, 37

Rules	Page
California Rules of Court, Rule 28(a)	5, 13
California Rules of Court, Rule 28(b)	5, 12
California Rules of Court, Rule 45(e)	5, 13
California Rules of Court, Rule 46	12

Statutes

California Administrative Code, Title 5, Sec. 5552	18
California Constitution, Art. IX	23
California Education Code, Sec. 35000	23
California Education Code, Sec. 40040	36
California Education Code, Sec. 42200	19
California Education Code, Sec. 44807	19
California Education Code, Sec. 44814	18, 19
California Education Code, Sec. 46014	39
California Education Code, Sec. 48200	19
California Education Code, Sec. 48930	20, 23, 24, 30
62 Statutes at Large (June 25, 1948), p. 929, ch. 646	3
United States Code, Title 28, Sec. 1257	8, 10
United States Code, Title 28, Sec. 1257(3)	1, 3
United States Constitution, First Amendment	2, 3, 4, 9, 14, 15, 17, 18, 22, 24, 32, 33, 34, 37, 39
United States Constitution, Fourteenth Amendment	2, 4, 14, 32, 33, 34

Textbook

35 Opinions of the California Attorney General, pp. 109, 111	19

IN THE

Supreme Court of the United States

October Term, 1976
No. 76-1739

BRUCE JOHNSON, a minor, by Earl D. Johnson, etc., *et al.*,

Petitioners,

vs.

HUNTINGTON BEACH UNION HIGH SCHOOL DISTRICT, *et al.*,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Introduction.

This is Respondents' brief in opposition to a petition for writ of certiorari to the Court of Appeal of the State of California, Fourth District, Division Two. The judgment of the Court of Appeal was rendered on March 11, 1977, 68 Cal. App. 3d 1, 137 Cal. Rptr. 43 (1977), affirming the judgment of the Superior Court of Orange County in case No. 228389, filed February 4, 1976, an unreported judgment.

Jurisdiction.

Respondents respectfully submit that Petitioners' allegation of jurisdiction under the provisions of 28 U.S.C. Section 1257(3) is unfounded and that in fact

this Court has no jurisdiction to review the instant case. Respondents' reasons for asserting a lack of jurisdiction are set forth in Section I of the Argument, *infra*.

Constitutional Provisions and Statute Involved in This Case: Pertinent Parts.

I

Constitutional Amendments.

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

U.S. Constitution, Amendment I.

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

U.S. Constitution, Amendment XIV.

II

Statute of the United States.

"Final judgments or decrees rendered by the highest court of a State in which a decision could

be had, may be reviewed by the Supreme Court as follows:

". . .

"(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

June 25, 1948, c. 646, 62 Stat. 929;
28 U.S.C. §1257(3) (1970).

Questions Presented.

1. When an unsuccessful party in a state intermediate appellate court fails to timely petition for a discretionary hearing in the highest court of the state, and that court declines to relieve the party from its default, does the decision of the intermediate appellate court constitute a judgment rendered "by the highest court of the state in which a decision could be had", allowing this Court to exercise jurisdiction pursuant to Title 28, Section 1257(3) of the United States Code?

2. Did the state appellate court correctly apply this Court's interpretation of the establishment clause of the First Amendment to the United States Constitution in concluding that a public school district could not sponsor a student religious club organized for the purpose of enabling its members "to know God better

so that they will be better persons . . . by prayerfully studying the Bible"?

3. Did the state appellate court correctly apply the decisions of this Court interpreting the establishment clause and free speech clause of the First Amendment to the United States Constitution in concluding that Respondent School District's action in refusing to recognize and sponsor a religious club did not infringe upon potential club members' First and Fourteenth Amendment rights?

Statement of the Case.

By Complaint filed in Orange County Superior Court, Petitioners prayed for a judgment declaring their right to have a Bible study club recognized and sponsored at Edison High School, located within Respondent District, and a judgment enjoining the Respondents from denying Petitioners recognition of their club and use of the high school facilities as granted to other student organizations pursuant to district rules and regulations. 68 Cal. App. 3d at 8. The matter was heard pursuant to a stipulated statement of facts. 68 Cal. App. 3d at 6. A judgment was entered decreeing that the Respondents were prohibited from recognizing Petitioners' Bible study club or from assisting Petitioners in their efforts to form a religious club under the First Amendment of the United States Constitution and that the school's refusal to recognize and sponsor the club did not violate Petitioners' free exercise guarantees under the same First Amendment. 68 Cal. App. 3d at 8.

Petitioners appealed to the Court of Appeal of the State of California, Fourth Appellate District, which affirmed the judgment in a two to one decision, 68

Cal. App. 3d 1, and denied a petition for rehearing. [See Appendix B to the Petition.]

A petition for hearing before the California Supreme Court was submitted for filing on April 21, 1977, pursuant to California Rules of Court, Rule 28(b), together with a request to be relieved from default for failure to timely file the petition pursuant to California Rules of Court, Rule 45(e). [Pertinent parts of the Rules of Court are attached hereto as Appendix A.] The application for relief from default was denied and the petition returned for failure to comply with Rule 28(b) as evidenced by Appendix C to the Petition. Contrary to Petitioners' jurisdictional statement, the Supreme Court of California never "denied hearing" on this cause, but merely refused to allow an untimely petition to be filed.

Having failed to file a timely petition for hearing, Petitioners requested that the California Supreme Court transfer the matter to itself for hearing and decision on its own motion pursuant to California Rules of Court, Rule 28(a). [Appendix D to the Petition.] Contrary to the assertion in the Petition, the state's supreme court did not "ignore" this request, but treated it as another request for relief from default under Rule 45(e) and again declined to grant such relief without ruling on the petition.[1] [Appendix E to the

[1]Although entitled "Petition Requesting Court to Grant Hearing on its own motion, pursuant to California Rules of Court, Rule 28(a)," the California Rules of Court make no provision for such a "petition". It is undisputed that the state supreme court could have heard the cause on its own motion regardless of whether the petition was submitted late or never filed at all. Petitioners' failure to timely petition the court did not deprive the Supreme Court of its power under Rule 28(a), *Hygienic Health Food Company v. Grant*, 188 Cal. 131, 204 Pac. 389, (1922), but the California Supreme Court failed to make the necessary motion.

Petition.] Therefore, Petitioners were never denied a hearing in the California Supreme Court; they failed to timely seek one.

The undisputed facts upon which the challenged decision is based are as follows:

Respondent Huntington Beach Union High School District is a public, tax-supported school district, responsible for high school education within its geographic jurisdiction and is the owner of and has control over the Edison High School.

Petitioners are or were students of the Edison High School who submitted an application for recognition of a student club whose purpose was "to enable student members to know God better so that they will be better persons and to accomplish this by prayerfully studying the Bible" and whose membership would be open only to those who "have a genuine interest in the fulfilling of the purpose of this organization." The application which was accompanied by a club charter was denied by the high school principal and subsequently by the District Board of Trustees. The Bible referred to was the sixty-six books collectively referred to as the "Old and New Testaments". It is significant that with the exception of the application for recognition of the specific club described in the charter, the Petitioners did not seek and were not denied any use of rooms or other space at Edison High School. 68 Cal. App. 3d at 6-8.

Pursuant to the California Education Code, the Board of Trustees and administration of Respondent District had enacted rules and regulations permitting and governing student clubs on the high school campus. Board Policy No. 5144 provides:

> "Clubs recognized by the Board of Trustees are those which are sponsored by the individual schools in the District." 68 Cal. App. 3d at 6 n.2.

Those clubs which are sponsored by the individual schools are governed by Staff Rule No. 5144. That rule provides that "clubs recognized by the individual school be sponsored by the school. These clubs must be directly responsible to the school." It further provides that club charters "must be approved by the associated students' governing body and by the principal of the school." The organization must:

"(1) Be sponsored by a member of the faculty appointed by the principal;

"(2) Deposit all monies collected and check out all monies through the school's financial secretary according to school regulations. All club accounts shall be audited.

"(3) Have the approval of the sponsor for the time and place and all activities carried on by the organization, including regular meetings. The sponsor must be present at all meetings.

"(4) Request and receive approval from the school principal for special social events."

A school-sponsored club is permitted to:

"(1) Use official name of the school.

"(2) To use buildings and other facilities.

"(3) To have publicity in daily bulletins, bulletin boards and school publications.

"(4) To wear an identifying emblem, but not special clothing.

"(5) To sell on school premises tickets or bids to special activities sponsored by the club."

Additional provisions require that the associated students' governing body and the principal approve any deviations from the requirements set forth in the staff rule and that the principal be obligated to insure that the clubs are not of a secret nature and are not in any way selective or discriminatory. 68 Cal. App. 3d at 6-7 n.3.

The District has not allowed religious clubs on campus except for a short period between January 8, 1974, and June 25, 1974, pursuant to a Board resolution which was rescinded under advice from the Orange County Counsel's office, which was acting as legal counsel for the District at the time. 68 Cal. App. 3d at 7-8.

Petitioners or other religious groups are free to apply for the use of school facilities under the California Civil Center Act, and rules and regulations adopted by the District, provided that such religious use does not interfere with the regular school day and is paid for. 68 Cal. App. 3d at 7 n.4.

Summary of Arguments.

In seeking to obtain a writ of certiorari directed to an intermediate state appellate court, Petitioners have failed to comply with the jurisdictional requirement of Section 1257 of Title 28 of the United States Code, limiting this Court's review to final decisions of the highest court of the state in which a decision could be had. Petitioners simply failed to timely petition for a hearing in the California Supreme Court and are seeking to bootstrap their way into this Court on the basis that the California Supreme Court determined that their failure to timely file a petition was

not justified by good cause and failed to take the matter up on its own motion. Such arguments are clearly contrary to the policy of the statute, and to Court decisions applying the statute.

Respondents also contend that there is abundant precedent from this Court setting forth proper construction of the establishment clause of the First Amendment to the United States Constitution in the context of public school sponsorship of religious activities and that that precedent was properly applied by the California Court of Appeal for the Fourth District in the instant matter. Moreover, there is an equal abundance of Court interpretation of that part of the First Amendment relating to freedom of speech and association which was likewise appropriately applied by the California Court of Appeal in determining that the School District did not unlawfully abridge any rights of petitioners in denying school sponsorship of their religious club.

ARGUMENT.

I

Petitioners Failed to Timely Petition for a Discretionary Hearing in the California State Supreme Court and Therefore Failed to Meet the Jurisdictional Requirement That a Decision Be the Decision of the Highest Court of the State in Which a Decision Can Be Had.

Section 1257 of Title 28 of the United States Code provides in relevant part:

> "Final judgments or decrees rendered by the highest court of the state in which a decision could be had, may be reviewed by the Supreme Court, as follows:
>
> ". . .
>
> "By Writ of Certiorari . . ."

That the highest state court requirement is jurisdictional is well-established. See, *e.g., Fisher v. Perkins,* 122 U.S. 522, 30 L.Ed. 1192, 7 S.Ct. 1227 (1887); *Stratton v. Stratton,* 239 U.S. 55, 60 L.Ed. 142, 36 S.Ct. 26 (1925); *Gotthilf v. Sills,* 375 U.S. 79, 11 L.Ed.2d 159, 84 S.Ct. 187 (1963). The decision of an intermediate court will not be considered the decision of the highest state court unless the petitioning party has exhausted the necessary efforts to obtain such review as is available by right or discretion. See, *e.g., Gregory v. McVeigh,* 90 U.S. 294 (23 Wall) (1875); *Douglas v. California,* 372 U.S. 353, 9 L.Ed.2d 811, 83 S.Ct. 814 (1963); *Fisher v. Perkins, supra; Stratton v. Stratton, supra; Gotthilf v. Sills, supra.*

In *Fisher v. Perkins, supra,* this Court required that the denial of a hearing in the highest court appear on the record in order to qualify the intermediate

court judgment for review. The Court noted at page 523 of the opinion:

> "It certainly would not be claimed that a judgment of the Superior Court could be reviewed by this Court . . . before an application had been made *in proper time* for the allowance of an appeal. . . ." (Emphasis added.)

In rejecting the petitioner's argument that his petition for appeal would not have been granted because he did not obtain the proper certificate from the superior court, this Court noted at the same page:

> "Want of the certificate is good reason for refusing to allow an appeal; but until it has been asked and refused, its absence furnishes no grounds for a writ of error from this Court. . . . We find nothing in the record to show that this suit could not have been taken to the court of appeal if the necessary application had been made, and consequently we have no right to proceed. . . . We are not to assume that an appeal would not have been granted if applied for. The record must show its refusal."

The importance of correctly pursuing the right of higher state court review was emphasized by this Court in *Gotthilf v. Sills, supra,* wherein a petition for certiorari was dismissed as being improvidently granted when it appeared that the matter was not heard in the highest state court because the party had improperly appealed his decision rather than having the question certified as required by state law. This was true even though the state remedy apparently was not altogether clear. See 375 U.S. at 81, Douglas, J. dissenting.

The importance of making proper and timely application is emphasized by those cases wherein an intermediate court's decision was accepted as the decision of the highest court of the state in which a decision could be had. In *Gregory v. McVeigh, supra,* the Court stated at page 306:

> "If a cause cannot be taken to the highest court of the state, except by leave of the court itself, a refusal of the court *upon proper application made* to grant the leave . . . may be made the basis of proceedings under the appellate jurisdiction of this Court." (Emphasis added.)

In *Gregory,* petitioner had properly presented his petition. The Court went on to note:

> "Thus the doors of the court of appeal had been forever closed against this suit; *not through neglect, but in the regular order of proceeding under the law governing the practice.*" (Emphasis added.)

Similarly, in *Douglas v. California, supra,* this Court considered the decision of a California District Court of Appeal as the decision of the highest court of the state only after petitioner's petition for discretionary review in the California Supreme Court had been denied. See 372 U.S. at 354 n.1.

Although entitled to petition the California Supreme Court for a hearing, pursuant to Court Rule 28(b) [see Appendix A], Petitioners failed to make a timely application. Pursuant to Rule 46 the Petition could not be filed. Therefore there was no petition for hearing ever filed in the California Supreme Court and no record of a hearing being denied, as required by this Court in *Fisher v. Perkins, supra.*

Petitioners seek to circumvent the requirement by asserting that the California Supreme Court's refusal to relieve them from their default to timely file as permitted by Court Rule 45(e) is equivalent to a denial of a petition for hearing. As evidenced by the statement of the state supreme court to petitioners attached to the Petition as Appendix B, that court merely determined that the miscalculation of time for filing a petition was not good cause for relief from the ten-day filing requirement. *It was not a denial of a hearing on the petition, but a denial of the right to file an untimely petition.* Clearly, petitioners' neglect does not even begin to reach the level of justification which this Court nonetheless rejected in *Gotthilf v. Sills, supra.* Of course, under established precedent this Court will not second-guess what action the California Supreme Court might have taken had a proper petition been presented. *Stratton v. Stratton, supra.*

Petitioners also seek to excuse their neglect and failure to properly petition the state supreme court on the basis that Court Rule 28(a) permits that court to transfer the matter to itself for hearing on its own motion. There is no basis in fact or law, however, for the conclusion that the failure of a court to act on its own motion constitutes a decision of the court. Such a conclusion would result in the anomalous situation of every intermediate California appellate court decision becoming the decision of the highest state court in which a decision could be had for Supreme Court jurisdictional purposes, even when no petition is presented to the state supreme court. It would impose upon the California Supreme Court the impossible burden of anticipating those important public questions which should first be decided by it before being pre-

sented to this Court. Furthermore, it would not further the statutory policy as recognized by this Court of requiring the party seeking review in this Court to exhaust all state court remedies. Under established precedent, petitioners have the duty of insuring that every opportunity for review in the highest state court is pursued, and failure to do so will preclude this Court from taking jurisdiction of the matter.

Petitioners carry the burden of demonstrating that they in fact have taken the matter to the highest state court possible, *Gorman v. Washington University*, 316 U.S. 98, 86 L.Ed. 1300, 62 S.Ct. 926 (1942), and have not met that burden. The Writ should therefore be denied on jurisdictional grounds.

II

The California Court of Appeal for the Fourth Appellate District Correctly Applied Well-Established Precedent of This Court in Determining That Approval and Sponsorship of Petitioners' Bible Study Club by a Tax Supported High School Is Prohibited by the Establishment Clause of the First Amendment of the United States Constitution.

The First Amendment of the United States Constitution provides in relevant part:

> "The Congress shall make no law respecting an establishment of religion."

This prohibition is incorporated in the due process clause of the Fourteenth Amendment and is applicable to and binding upon the states. See, *e.g., Engel v. Vitale*, 370 U.S. 421, 479, 8 L.Ed.2d 601, 82 S.Ct. 1261 (1962); *Abington School District v. Schempp*,

374 U.S. 203, 217, 10 L.Ed.2d 844, 83 S.Ct. 1560 (1963).

In applying this particular provision, this Court has determined that the prohibition against establishment and interference with the exercise of religion contained in the First Amendment is absolute. *Zorach v. Clauson*, 343 U.S. 306, 311, 96 L.Ed. 954, 72 S.Ct. 679 (1951).

In *Abington School District v. Schempp, supra*, at pages 217-218, the majority noted that the Amendment comprehensively forbade "*every form* of public aid or support for religion" and precluded the state from undertaking or sustaining religious training, teaching, or observance "in any form or degree". As noted by Justice Brennan in his separate concurring opinion at page 299:

> "If the state must be steadfastly neutral in all matters of faith and neither favor nor inhibit religion, in my view, government cannot sponsor religious exercises in the public schools without jeopardizing that neutrality."

Over the past thirty years the First Amendment establishment clause has been the subject of many decisions in this Court. For example, in *Everson v. Board of Education*, 330 U.S. 1, 91 L.Ed. 711, 67 S.Ct. 504 (1947), Justice Rutledge gave a thorough historical treatment of the evolution of the establishment clause in his frequently referred to dissent.

Two of those cases, referred to by Petitioners and of great interest to the present action are: *McCollum v. Board of Education*, 333 U.S. 203, 92 L.Ed. 649, 68 S.Ct. 461 (1947), and *Zorach v. Clauson, supra.* (The current viability of both cases was recently recognized by the Fourth Circuit Court of Appeals in *Smith*

v. Smith, 523 F.2d 121, 123 (4th Cir. 1975). See also *Committee for Public Education and Religious Liberty v. Nyquist,* 413 U.S. 756, 771, 37 L.Ed.2d 948, 93 S.Ct. 2955 (1973).)

In *McCollum,* private religious groups employed religious teachers to come weekly into the school buildings, during the normal school day and for a period of thirty minutes substituted their religious teaching for secular education. The two factors which led the Court to conclude that the practice violated the First Amendment were the use of school buildings and the fact that the religious education occurred during the compulsory school day, *i.e.,* a time when students were required to be on campus. Mr. Justice Black, speaking for the majority of the Court, stated at page 212 of the opinion:

> "Here not only are the state's tax-supported public school buildings used for the dissemination of religious doctrines. The state affords sectarian groups an invaluable aid in that it helps to provide pupils for their religious classes through use of the state's compulsory public school machinery. This is not separation of Church and State."

In an opinion concurred in by three other members of the Court, Mr. Justice Frankfurter went on to note that released time programs, where students were released for a period of time from their normal secular activities in order to pursue religious training, required "close judicial scrutiny". In a footnote he enumerated the various factors which must be looked into including "the extent to which school property and administrative machinery [were] involved." 333 U.S. at 225 n.17.

Subsequently, in *Zorach,* this Court held that a release time program where students were released during a school day so that they may "leave the school buildings and school grounds and go to religious centers for religious instruction or devotion exercises" did not violate the establishment clause of the First Amendment. 343 U.S. at 308. *McCollum* was distinguished on the basis that public classrooms were not used. The Court noted at pages 308-309 of the opinion:

> "This 'released time' program involves neither religious instruction in public classrooms nor the expenditure of public funds. All costs, including the application blanks are paid by the religious organizations. The case is therefore unlike *Illinois ex rel. McCollum vs. Board of Education,* 333 U.S. 203, 92 L.Ed. 649, 68 S.Ct. 461, 2 ALR 2d 1338, which involved a 'released time program' from Illinois. In that case the classrooms were turned over to religious instructors. We accordingly held that the program violated the First Amendment, which (by reason of the Fourteenth Amendment) prohibits the state from establishing religion or prohibiting its free exercise."

The majority opinion went on to note at page 314:

> "But [government] can close its doors or suspend its operations as to those who want *to repair to the religious sanctuary for worship or instruction. No more than that is undertaken here.*" (Emphasis added.)

As noted by Mr. Justice Black in comparing the *Zorach* facts to the *McCollum* facts:

> "Except for the use of the school buildings in Illinois, there is no difference between the systems

which I consider even worthy of mention." 343 U.S. at 316, Black, J. dissenting.

In their Petition, Petitioners attempt to minimize the fact that school buildings were actually used in *McCollum* and assert that *Zorach* is controlling in the instant case. In so doing Petitioners ignore the cited language from *Zorach* and the substantial similarity between the *McCollum* facts and the instant action. In addition, Petitioners rely on the concurring opinion of Mr. Justice Brennan in *Abington School District v. Schempp, supra,* and several recent inapposite lower court decisions.

Petitioners fail to point out that the majority in *Schempp* noted that the exercises which were proscribed by the First Amendment in that case "were part of the curricular activities of the students who were required by law to attend school" and were "held in the school buildings under the supervision and with the participation of teachers employed in those schools." The Court noted at page 223 of the opinion:

> "None of these factors, other than compulsory school attendance, was present in the program upheld in *Zorach v. Clauson.*"

Under California law, Respondents are responsible for the conduct and activities of students from the time they arrive at school in the morning until the time they leave. This supervisory responsibility includes the noon hour and activities on campus both before and after class instruction. See, *e.g.*, 5 California Administrative Code Section 5552, California Education

Code Sections 44814 and 44807;[2] *Taylor v. Oakland Scavenger Co.*, 17 Cal. 2d 594, 110 P.2d 1044 (1941); *Cieglar v. Santa Cruz High School Dist.*, 168 Cal. App. 2d 277, 284, 355 P.2d 709 (1959). (It should be noted that non-teachers who supervise students during the noon hour under Education Code Section 44814 are employed to do so. See 35 Ops. Cal. Atty. Gen. 109, 111, and California Education Code Section 42200, which provides for additional school taxes to pay such supervisorial employees.) It is during this period of school responsibility that Petitioners request that they be granted the right to "prayerfully study the Bible". Petitioners' demands for club sponsorship include not only use of school facilities but also faculty supervision. The Bible Study Club is to be a part of the regular school "extracurricular" activity program and activities and study will be so positioned as to make it a part of or an extension of the regular school day and thereby take advantage of student presence on campus mandated by compulsory education attendance laws. See California Education Code Section 48200. If Petitioners had been granted the relief requested, they would also have been able to "use the official name of the school", to publicize their religious activities on bulletin boards and in school publications and to sell tickets on school premises to special activities spon-

---

[2]Since the decision of the California District Court of Appeal, the California Education Code was reenacted and renumbered. Therefore, the references in this brief are to the new Code. It should be noted, however, that none of the sections cited by the state appellate court were substitutively altered.

sored by the club. 68 Cal. App. 3d at 6-7 n.3. The school would be involved in monitoring all monies obtained by the club and approving any special social functions that the club might have. 68 Cal. App. 3d at 6-7 n.3; see also California Education Code Sections 48930 *et seq*. Clearly, the involvement exceeds that which was held impermissible by this Court in both *Schempp* and *McCollum*. There is a world of difference in Petitioners' request in the instant action to study religion *on campus* during lunch hour and an extension of the school day and under school supervision and leaving campus for religious instruction during the school day which was held permissible by this Court in *Zorach*.

The decisions of lower federal courts referred to by Petitioners in their Petition as a limitation on *McCollum* are also distinguishable. For example, in *Wood v. Mt. Lebanon Township School District*, 342 F.Supp. 1293 (W.D. Pa. 1972), the court noted in permitting prayers at a graduation ceremony that the graduation ceremony follows and *is completely separate and apart from all formal requirements of the school district for graduation, and was not part of the day-to-day school activity*. 342 F.Supp. at 1294. Moreover, the court noted that the ceremonies were "totally separate from school routine" and were in no way connected with the school *nor approved by* the school.

In *Reed v. Van Hoven*, 237 F.Supp. 48 (W.D. Mich. 1965), the court attempted to set forth the type of religious activity on a school campus that would be permissible. In attempting to permit some type of pre-school and post-school religious activity, the court specifically recognized at page 54 that:

> "Those who do take the opportunity to participate in the program must be separate from the official activity of the school, as of course must be the program itself."

There was no question of school sponsorship of a club. The court further noted that it would have to closely monitor the undertaking and might ultimately have to take testimony to determine whether the program could be satisfactorily applied in order to avoid establishment clause problems. 237 F.Supp. at 57. (The decision does nothing more than deny a preliminary injunction and establish guidelines to be applied during the pendency of the lawsuit.)

In *Stacey v. William*, 306 F.Supp. 963 (N.D. Miss. 1969), the court was concerned with the right of a university organization to invite an outside speaker to address its members on a religious theme. See 306 F.Supp. at 975-976. In *Stacey* there was no question of school sponsorship of a particular religious club with a particular religious affinity or affiliation with certain books of the Old or New Testament.

In attempting to distinguish *McCollum* and to rely on *Zorach*, Petitioners have not analyzed the recent case of *Smith v. Smith*, 523 F.2d 121 (4th Cir. 1975), wherein the Fourth Circuit Court of Appeal held that a major distinction between *Zorach* and *McCollum* was the use of classrooms. The court noted therein at page 123:

> "The majority opinion by Mr. Justice Douglas in *Zorach* offered three possible distinctions between this program and the one invalidated in *McCollum*. The *Zorach* program provided [1] 'neither religious instruction in public school class-

rooms, [2] nor the expenditure of public funds.' 343 U.S. at 308-09, 72 S.Ct. at 681. In *McCollum*, on the other hand, 'the classrooms were used for religious instruction and [3] the force of the public school was used to promote that instruction.' 343 U.S. at 315, 72 S.Ct. at 684. The second and third distinctions seem, in fact, to depend on the first and crucial distinction; in *McCollum*, the public school turned its classrooms over to the religious instructor; in *Zorach*, the schools only adjusted 'their schedules to accommodate the religious needs of the people'."

It is the use of public school classrooms which is precisely what Petitioners desire to have. As noted, this use would be during normal hours when the school would be used for school purposes and under the direction or supervision of school personnel.

An application of *McCollum, Schempp* and *Zorach* to the facts in the instant action clearly compelled the California appellate court conclusion that the relief requested by Petitioners would violate the establishment clause of the First Amendment of the United States Constitution based upon the facts set forth in the opinion. This conclusion is buttressed by a review and application of the tripartite test most recently used by this Court in disposing of establishment clause cases.

The test is set forth in *Meek v. Pittenger*, 421 U.S. 349, 358, 44 L.Ed.2d 217, 227, 95 S.Ct. 1753 (1975), as follows:

"First, the statute must have a secular legislative purpose. Eg., *Apperson vs. Arkansas*, 393 U.S. 97, 21 L. Ed. 2d 228, 89 S. Ct. 266. Second, it must have a 'primary effect' that neither ad-

vances nor inhibits religion. E.g., *School District of Abington Township vs. Schempp*, 374 U.S. 203, 10 L. Ed. 2d 844, 83 S. Ct. 1560. Third, the statute and its administration must avoid excessive government entanglement with religion. E.g., *Walz vs. Tax Commission*, 397 U.S. 664, 25 L. Ed. 2d 697, 90 S. Ct. 1407."

The application of the test is often a matter of degree and must be strictly based on the particular facts of the case before the court. *Walz v. Tax Commission*, 397 U.S. 664, 669, 674, 25 L.Ed.2d 697, 90 S.Ct. 1409 (1970); see also *Meek v. Pittenger supra* at 359.

Sponsorship of Petitioners' Bible Study Club by a public school district would violate all three tests.

A. The Purpose of a Religious Club.

Respondent High School District is a creation of the California State Legislature pursuant to Article IX of the California Constitution and Education Code Sections 35000 *et seq*. Its primary purpose is to provide education and it cannot act beyond the scope of authority vested in it. The fact that clubs are to further the educational purpose or objective of Respondent is evidenced by Staff Rule 5144, which requires a faculty sponsor "appointed by the principal". 68 Cal. App. 3d at 6-7 n.3. Moreover, Education Code Section 48930, which permits student organizations, provides in relevant part:

". . . any such organization shall have as its purpose the conduct of activities *on behalf of the students* approved by the school authorities and *not in conflict with the authority and responsibility*

of the public school officials. . ." (Emphasis added.)

Hence, either directly or indirectly, any student organization such as Petitioners' club should further the basic responsibility of the public school officials, *i.e.*, education. Although education may in part consist of intercommunication between students, it also involves conveyance of information by teachers. Therefore, District regulation requires faculty sponsorship and control by the principal and the subject matter of the club becomes an integral part of determining its educational value.

The only purpose in sponsoring or permitting the establishment of a religious club, then, would be to further the religious education of students in a club type atmosphere. Such active sponsorship and furthering of religious education would be more than the accommodation of personal beliefs permitted in the case of *O'Hair v. Paine,* 312 F.Supp. 434 (W.D. Tex. 1969), affirmed *per curiam* 432 F.2d 66 (5th Cir. 1970), *cert. denied* 401 U.S. 955 (1971), which is cited by Petitioners. When a school district has been actively involved even to a limited degree in sponsoring a particular religious action or activity, such as Bible reading or prayer both of which are proposed by Petitioners' charter, the Court has consistently found an illegal purpose in violation of the establishment clause of the First Amendment. See, *e.g., Abington School District v. Schempp, supra; Engel v. Vitale, supra.*

B. The Primary Effect of Sponsoring Petitioners' Religious Club Would Be to Foster a Sectarian Viewpoint.

In attacking the conclusion that the primary effect in permitting this club a charter under Board Policy Number 5144 and Staff Rule Number 5144 would be to advance or inhibit religion, Petitioners refer to decisions of this Court involving the use of streets and parks for religious gatherings and ignore the fact that the challenged decision was addressing itself to a particular club under a particular charter to be approved and governed by particular policies and rules. Respondents have already discussed at length the additional involvement of the school over and above mere use of physical facilities which would result from recognizing the Bible study club. In addition, Respondents have discussed in detail how the use of a school room during school time has been repeatedly proscribed by this Court. (See *Smith v. Smith, supra* at 123 n. 6 wherein the court noted that "the expenditures of public funds in *McCollum* consisted of little more than the loan of the school classroom to religious instructors.")

Indeed, there is a vast difference in the collective use of a public park or street which is open to the general public continually, as in the case of *Saia v. New York,* 334 U.S. 558, 92 L.Ed. 1574, 61 S.Ct. 1148 (1948); *Kunz v. New York,* 340 U.S. 290, 95 L.Ed. 267, 71 S.Ct. (1951), and *Niemotko v. Maryland,* 340 U.S. 268, 95 L.Ed. 267, 71 S.Ct. 325 (1951), and the facts in the instant case which involve the use of school classrooms, during the course of the normal school day and under the direction and supervision of school personnel responsible for the safety,

conduct and education of the students involved in the religious instruction. Contrary to Petitioners' argument, the use of the classrooms is not the only basis for asserting that the effect of recognizing their religious club would be to promote religion. The California appellate court also recognized the fact that the property would be used at times when the students are required to be there (the noon hour) or take advantage of the legal requirement of attendance during the day by using the facilities immediately before and after school as part of an official school program, together with the sponsorship and other controlling factors hereinafter discussed that violate the establishment clause, 68 Cal. App. 3d at 13. As noted, contrary to Petitioners' assertion, this is not a *Zorach*-type program where religious study is held away from the high school campus. The effect of this sponsorship is to promote the particular religious viewpoint of the club members or their parents.

Furthermore, Petitioners' analysis ignores the long line of cases holding that state actions are in violation of the establishment clause where the institution or group benefited by the act are predominantly religious in nature or character. For example, in *Meek v. Pittenger, supra,* the Court noted at pages 365-66:

> "Even though ear-marked for secular purposes, 'when [aid] flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission', state aid has the impermissible primary effect of advancing religion."

See also *Committee for Public Education v. Nyquist, supra.*

In *Meek* and *Nyquist,* the Court held that even though the purpose of the state action was secular, the effect was impermissible in view of the fact that the supposed secular aid was granted to religiously oriented institutions which were further enabled to promote their particular values and ideologies. As in those cases, any purpose that the School District has in fostering clubs and interchange of ideas between students is transformed into the effect of promoting the religious ideal or theology of Petitioners when the school provides facilities and sponsorship for their club in which religion would be "pervasive". The effect of the school sponsorship and granting use of facilities is clearly one of advancing the religious beliefs of the group involved.

An additional aspect of the "effect" test also applies in the instant action. Citing *Abington School District v. Schempp, supra,* and *Engel v. Vitale, supra,* the court in *Reed v. Van Hoven, supra,* discussed this additional aspect at page 53 of its opinion. The court noted therein:

> *"It is only necessary that the practice or enactment have the net effect of placing the official support of the local or national government behind a particular denomination or belief."* (Emphasis of the Court.)

Clearly, the sponsorship of Petitioners' Bible study club would have the ultimate or net effect of placing the official support of the school district behind the student club which, pursuant to the rules and regulations, can bear the school's name, use school facilities, use school media, and obtain numerous other special concessions from the school by reason of its "official" status. 68

Cal. App. 3d at 6-7 n.3. The effect of approving a religious club under the District's current rules would be not only to permit but to encourage a particular religious belief and as discussed hereinafter to encourage controversy and political strife among students vying for student membership, recognition and favor.

C. Recognition of Appellants' Bible Study Club Would Result in Excessive Entanglement.

The entanglement aspect of the tripartite test is relatively new. However, sufficient judicial interpretation exists to enable accurate application of that principle in the instant action. In analyzing this aspect of the test, Petitioners attempt to draw an analogy with *Zorach* and argue that supervision by school personnel is substantially similar to that of the truancy-related surveillance provisions of the *Zorach* released time program. There is nothing in the District's rules and regulations which limits a faculty sponsor to surveillance. The obvious purpose for having a faculty sponsor is not only to insure that the District fulfills its responsibility of directing the conduct of students but also to insure that the student clubs are used as a positive educational experience for students, enabling them to better perform in society. For a court to legislate district rules by holding that a "faculty sponsor" need only supervise for safety purposes and need not supervise the actual functioning of the student organization, including the direction of student discussion and studies is excessive judicial interference in the educational process and would seriously undermine the importance of having a trained educator responsible for clubs.

Even if the faculty sponsor's role were limited to mere surveillance, a problem recognized by the Court

in *Meek v. Pittenger, supra,* at page 370 would nonetheless exist. The Court stated therein:

> "The prophylactic contacts required to insure that teachers play a strictly non-ideological role, the court held necessarily give rise to a constitutionally intolerable degree of entanglement between the Church and the State. [Citation omitted.] The same excessive entanglement would be required for Pennsylvania to be 'certain', *as it must be,* that Act 194 personnel do not advance the religious mission of the church-related schools in which they serve. [Citations omitted.]" (Emphasis added.)

See also *Lemon v. Kurtzman,* 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971).

In the instant action it is naive to assume that a teacher who is willing to accept the additional responsibility of a faculty sponsorship would not be one sympathetic to the religious views of the students involved, and could refrain from actively participating in student discussions of the Bible and student prayer. In order to insure against such a problem, the District would have to develop prophylactic contacts which insure a strict neutrality on the part of the teacher, which would itself involve a certain amount of entanglement. In addition, the teacher sponsor would be the principal's agent in insuring that there was no discrimination in club membership [68 Cal. App. 3d at 6-7 n.3], and might well be involved in disputes resulting from student heckling, etc.

Additional entanglements which are ignored by Petitioners in their Petition involve club charter provisions which expressly request that the school administration

alter the charter in order to make it acceptable and guidelines under Staff Rule 5144, and California Education Code Sections 48930 *et seq.* requiring that the School District be responsible for all club funds and approval of club meetings and special activities.

An additional aspect of entanglement has recently received emphasis by the Supreme Court in *Committee for Public Education v. Nyquist,* 413 U.S. 756, 93 S.Ct. 2955, 37 L.Ed.2d 948 (1973). The Court discussed therein the potential for political strife resulting from governmental entanglement in religious affairs. As recognized by the California appellate court at page 14 of its opinion, it takes little imagination to envision the conflicts which might result in the event that the District or a particular high school lacked adequate facilities to sponsor all religious clubs desiring sponsorship, or did not have a faculty member who was willing to undertake the sponsorship of a particular club, let alone the conflict which would arise as clubs poselyte for and solicit membership during school hours.

Petitioners attempt to minimize the political divisiveness which may result by asserting that the cases of *Committee for Public Education v. Nyquist, supra,* and *Lemon v. Kurtzman, supra,* involved expenditures of large sums of money. In so doing, Petitioners appear to be conceding that there would be some effect and some support of religion by the sponsorship of the club but that because the school district was not spending large sums of money, such support and effect would be permissible. Such an argument naively ignores the history so lucidly described by Mr. Justice Black in *Engel v. Vitale, supra.* tracing the growth of religious prejudice. Unfortunately, when religious beliefs are in-

volved, economic considerations are often subservient to a desire for political favors. Moreover, the argument ignores the strict and absolute application of the establishment doctrine by this Court. As stated in *Everson v. Board of Education,* 330 U.S. 1, 16, 91 L.Ed.2d 711, 67 S.Ct. 504 (1947):

> "*No tax in any amount,* large or small, *can be levied to support any religious activities or institutions, whatever they may be called,* or whatever form they may adopt to teach or practice religion." (Emphasis added.)

Whatever a school district desires, it is not in a position to sponsor a club which has the stated purpose of fostering sectarian religious views. (It is well recognized that the study of the Bible or a particular version of the Bible is sectarian and will result in religious conflict. See the expert testimony summarized in *Abington School District v. Schempp, supra,* at 209-210, and the discussion of sectarian use of the Bible by the California Supreme Court in *Evans v. Selma Union High School District,* 193 Cal. 54, 222 Pac. 801 (1924).)

The Respondent District has adopted rules and regulations governing clubs which would indicate that the District's purpose is one not only of fostering the exchange of ideas, but also using clubs as part of the pedagogical process. To force the District to restructure its rules and regulations to accommodate a religious club or to ignore those rules and regulations and their particular purpose would in and of itself be an establishment violation. The District's purpose is one of secular education and involves the use of physical facilities and faculty and is undertaken during the

school day. The education process involves those facilities and faculty members during the noon period and before and after school for "extracurricular" activities designed to foster that secular education. To include religious clubs within that program is clearly impermissible and would be a violation of the establishment clause of the First Amendment to the United States Constitution. Sponsorship of Petitioners' club not only would have the purpose and effect of furthering a particular religious doctrine but also would result in excessive entanglement between the Church and the State and potential political divisiveness as warned against by this Court. The Petitioners' club as proposed is simply not a *Zorach*-type released time program, as argued by Petitioners and rejected by the California appellate court. Rather, it has too many of the factors listed and recognized by this Court in other cases, more particularly *McCollum* and *Schempp*, to permit the District to recognize it under existing policies and regulations, and statutorially imposed duties. School district accommodation to religious feelings cannot include school sponsorship with use of school facilities during school time, supervised and aided by school faculty.

III

The California Court of Appeal for the Fourth Appellate District Correctly Applied Well-Established Precedent of This Court in Determining That Petitioners Were Not Deprived of Any First or Fourteenth Amendment Rights by Respondents' Refusal to Sponsor Their Bible Study Club.

In arguing that the California appellate court decision deprives them of First Amendment and equal protection rights, Petitioners seek to extend the analysis

of the court beyond the facts presented to it. The matter involved school sponsorship of a particular religious club under existing rules and regulations. There was no evidence in the record that Petitioners have ever been deprived of the right to meet informally and discuss religion or read the Bible on free time at school. Petitioners were only denied school sponsorship of their religious club. Petitioners' characterization of school sponsorship as mere tolerance belies the facts presented to the State appellate court. It is not a question of Petitioners being denied the right to meet and discuss the Bible, but rather a question of whether the Petitioners can force the School District to officially sponsor their club. The important matter of concern is that the School District has refused to recognize the Petitioners' religious club, just as it has refused to recognize any other religious club. Indeed, except for a short period of time, from January of 1974, until June, 1974, the District has never recognized any religious club or any club whose primary purpose was one of fostering religious thought, such as Petitioners'. 68 Cal. App. 3d at 7-8. The state appellate court therefore correctly determined that Respondents did not violate the First or the Fourteenth Amendment of the Constitution.

A. The Denial of Official Recognition to All Religious Clubs Does Not Violate Either the First or the Fourteenth Amendments.

In *Hunt v. Board of Education of County of Kanawha, supra,* a group of students were meeting on a voluntary basis prior to school, for the purpose of holding prayer. In light of school regulations and policies prohibiting the use of school buildings for religious

purposes and requiring that students be under school supervision when present at a school building, the principal of the high school at which the prayer sessions were taking place informed the students that such prayer sessions could not continue and denied the students access to any classrooms or other premises for the purpose of conducting their prayer sessions. The students sued the school authorities on the grounds that their First and Fourteenth Amendment Rights had been denied. The court, addressing these issues, stated at page 1265:

> "The present case, on the other hand, presents only two questions: First, whether the Board of Education had the authority to prohibit the use of school facilities for any religious purpose, and second, whether such prohibition is constitutionally permissible. It is my conclusion that both of these questions must be answered in the affirmative."

The court further stated at page 1266:

> ". . . I am further of the opinion that this proscription does not deny to the plaintiffs their Federal constitutional rights of freedom of speech, freedom of assembly or the free exercise of their religious beliefs. This power of school authorities to prohibit the use of a schoolhouse for religious worship is well recognized. See 47 Am. Jur. Schools § 213 at 454 and collation of authorities therein."

The court concluded that there was no invidious discrimination in view of the fact that the "Board of Education denies to anyone, regardless of sect, the use of public school property for religious purposes." 321 F.Supp. at 1266. The court also cited and quoted

from the Ohio Supreme Court decision of *State ex rel. Greisiger v. Grand Rapids Board of Education,* 88 Ohio App. 364, 100 N.E.2d 294, *cert. denied* 340 U.S. 820, 71 S.Ct. 51, 95 L.Ed. 603, *rehearing denied* 341 U.S. 917, 71 S.Ct. 733, 95 L.Ed. 1342, wherein the Ohio Supreme Court basically reached the same result. See also *State Board of Education v. Board of Education of Netcong,* 108 N.J.Super. 564, 262 A.2d 21 (1970), *cert. denied* 401 U.S. 1013 (1971).

The argument that the exclusion of religious practices or religious activities on a public school campus in connection with a regular school program is a denial of First Amendment rights and unduly inhibits or hampers the religious exercise of those desiring to have such religious expression on campus has repeatedly been rejected by this Court. See, *e.g., Abington School District v. Schempp, supra,* at 225-226; *cf. Engel v. Vitale, supra,* at 434.

Although this Court has never directly passed upon the issue of whether a state agency could totally and completely exclude a certain category of speech such as religion or politics from certain public parks or places, see *Poulous v. New Hampshire,* 345 U.S. 403, 97 L.Ed. 1112, 73 S.Ct. 760 (1953) and it would appear that the Court may require some open area in the community to be preserved for outdoor assemblies, *Cox v. Louisiana,* 379 U.S. 536, 555 n.12, 13 L.Ed.2d 471, 85 S.Ct. 453 (1963), such is not an issue in this case, as there is no evidence that Petitioners have no public forum in which to meet or express their views. In fact, under the state Civic Center Act, Petitioners can use the school as a forum

after school hours and in such a manner not as to interfere with Respondents' school activities. See California Education Code Sections 40040 *et seq.; Danskin v. San Diego Unified School District,* 28 Cal. 2d 536, 171 P.2d 885 (1946). See also *Lehman v. City of Shaker Heights,* 418 U.S. 298, 41 L.Ed.2d 770, 94 S.Ct. 2714 (1974), wherein this Court held that there could be subject matter exclusion by a public agency in regulating speech in an area not regarded as a traditional public forum. In discussing what constitutes a public forum, a four-member minority cited many of the cases relied upon by Petitioners herein, but recognized that some public places are so clearly committed to other purposes that their use as public forums for communication is anomalous. 418 U.S. at 312. The minority went on to point out that the determination of whether a particular type of public property or facility constitutes a "public forum" requires the court to strike a balance between the competing interests of the government on the one hand and the speaker and his audience on the other, and noted that "the court must assess the importance of the *primary use* to which the public property or facility is committed and the extent to which that use will be disrupted if access for the expression is permitted." (Emphasis added.) Potential disruption arising out of religious conflict when there is state support has been recognized by the Court and by the State appellate court in this case as discussed. The cases indicate that the traditional public forums are parks and streets, (see *Hague v. CIO,* 307 U.S. 496, 515-516, 83 L.Ed. 1423, 59 S.Ct. 954 (1939)) which unlike a school are available to the public at all times and do not have a primary commitment to education.

B. The Ban on School-Sponsored Religious Clubs Is Justified by a Compelling State Interest.

At the onset it must be noted that the prohibition under the establishment clause of the First Amendment has been held by this Court to be absolute. See, *e.g., Zorach v. Clauson, supra,* at 312. It has also been noted that the freedom to exercise religion or "to act" as opposed to the freedom to believe, is not absolute. *Abington School District v. Schempp, supra,* at 218. More particularly, it has been held that the rights of free speech and assembly "while fundamental to our democratic society, do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time." *Cox v. Louisiana, supra,* at 554. There simply is no constitutional right to have a school sponsored religious gathering, as proposed by Petitioners, as part of a regular school program.

As noted by the Court in *Abington School District v. Schempp, supra,* at page 226:

> "The place of religion in our society is an exalted one, achieved through a long tradition of reliance on the home, the church and the inviolable citadel of the individual heart and mind. We have come to recognize through bitter experience that it is not within the power of government to invade that citadel, whether its purpose or effect be to aid or oppose, to advance or retard. In the relationship between man and religion, the state is firmly committed to a position of neutrality. Though the application of that rule requires interpretation of a delicate sort, the rule itself is clearly and concisely stated in the words of the First Amendment."

It must be remembered in the instant action that Petitioners are seeking to have their religious club not only recognized but sponsored by Respondent District. It also must be remembered that the Petitioners have not sought or been denied any use of rooms or other space at the Edison High School apart from the denial of the recognition of their club. Petitioners' argument to the effect that they are being denied the right to enter into an interchange of religious ideas during free time is not accurate. Petitioners are only being denied official sponsorship by the school. The school can only act pursuant to existing rules and regulations, and has applied those rules and regulations in an even-handed manner.[3]

In view of the fact that religious education can proceed outside of the school day without any great

---

[3]No effort has been made to brief the issues raised in the Petition relating to District regulations being void for "vagueness and overbreadth" and lacking adequate "standards" in view of the fact that the issues were not adequately presented in the State court proceedings and therefore considered by the state court to be abandoned. 68 Cal. App. 3d at 8 n.7. As noted by this Court in *Whitney v. California,* 274 U.S. 357, 360, 71 L.Ed. 1095, 47 S.Ct. 641 (1926):

> "It has long been settled that this Court acquires no jurisdiction . . . unless it affirmatively appears upon the face of the record that [the federal question] . . . was presented in and expressly or necessarily decided by such state court."

See also *Ellis v. Dixon,* 349 U.S. 458, 99 L.Ed. 1231, 75 S.Ct. 850, *rehearing denied* 350 U.S. 855, 100 L.Ed. 759, 76 S.Ct. 37 (1955).

In addition, Respondents have not replied to Petitioners' arguments concerning the proper application of the California Constitution. The proper application of a state law is a matter of state court interpretation. Petitioners, of course, cannot ask this Court to hold that the California court did not properly interpret and apply California law. *Bob-lo Excursion Co. v. Michigan,* 333 U.S. 28, 33, 92 L.Ed. 455, 68 S.Ct. 358 (1948).

personal harm or detriment to the Petitioners, as opposed to the great potential for harm which results from school sponsorship and involvement in religion as so often recognized by this Court in the cases discussed, the balance must weigh against requiring the school district to actively sponsor a student religious club. The great potential for favoritism and political division which was the basis for the adoption of the First Amendment amply justifies Respondents' refusal to become embroiled in religious controversy by simply precluding all religious clubs.

Conclusion.

The issue presented to the State appellate court by the stipulated statement of facts was whether the Respondents had an affirmative obligation to sponsor Petitioners' religious club. Based upon the many benefits which accrue from such sponsorship, the State appellate court correctly applied well-established precedent from this Court in concluding that such action would violate the establishment clause of the First Amendment. Certainly, the Respondents desire not to become embroiled in religious controversy by refusing to sponsor any religious club does not in any way unlawfully interfere with Petitioners' First Amendment rights to speech and association. Should Petitioners wish to pursue some form of religious training, they should exercise their rights under California Education Code Section 46014 for a *Zorach*-type released type program and have their instruction totally apart and away from the school.

Moreover, Petitioners failed to properly invoke the jurisdiction of this Court by failing to present the matter to the California Supreme Court by a timely petition for hearing.

Therefore, it is respectfully submitted that the writ of certiorari should not issue.

Respectfully submitted,

RUTAN & TUCKER,
DAVID C. LARSEN,
By DAVID C. LARSEN,
Attorneys for Respondents.

APPENDIX A.

Rule 28. Hearing in Supreme Court.[1]

(a) [*Time within which court may grant hearing*] Within 30 days after a decision of a Court of Appeal becomes final as to that court, the Supreme Court, on its own motion, or on petition as provided in subdivision (b), may order the cause transferred to itself for hearing and decision, and within the original 30-day period or any extension thereof the Supreme Court may for good cause extend the time for one or more additional periods not to exceed a total of an additional 60 days. As amended, effective Jan. 1, 1957; Jan. 1, 1959; Jan. 1, 1961; Jan. 2, 1962; Nov. 11, 1966; Jan. 1, 1968.

(b) [*Time for filing petition*] A party seeking a hearing must serve and file a petition therefor within 10 days after the decision of the Court of Appeal becomes final as to that court, except that a petition may not be filed after denial of a transfer to a Court of Appeal after certification in a case within the original jurisdiction of a municipal or justice court. Proof shall be made of the delivery or mailing of one copy of the petition to the clerk of the Court of Appeal which rendered the decision. When such copy is delivered to the clerk of the Court of Appeal, he shall forthwith transmit to the clerk of the Supreme Court the original record, briefs, and all original papers and exhibits on file in the cause. If the petition is

[1]See rule 24(a). The "decision" referred to in rule 28 is the opinion or judgment of the court, not a subsequent ruling denying a rehearing, unless that ruling constitutes a modification of the judgment under rule 24(a).

denied, the clerk of the Supreme Court shall return them to the clerk of the proper Court of Appeal. If the petition is granted, they shall be retained and properly numbered by the clerk of the Supreme Court. As amended, effective Jan. 1, 1957; Jan. 1, 1959; Jan. 2, 1962; Nov. 11, 1966; Jan. 1, 1972.

(c) [*Time for filing answer*] An answer may be served and filed within 20 days after the decision becomes final as to the Court of Appeal. As amended, effective Jan. 1, 1957; Jan. 1, 1959; Nov. 11, 1966.

(d) [*Form of petition and answer*]

(1) Except as provided herein, the petition and answer shall, insofar as practicable, conform to the provisions of rule 15.

(2) Each copy of the petition shall contain or be accompanied by a copy of the opinion of the Court of Appeal, showing the date of its filing.

(3) The petition shall be a single document including a brief in support of the request for hearing. All contentions in support of the petition shall be included therein, including all legal authorities and argument. If a party files an answer to the petition, it shall be a single document which includes all of his contentions in opposition to the petition. No authorities or argument may be incorporated by reference from another document into the petition, or into the answer, except that the petition or answer may incorporate by reference specified portions of a petition for hearing or answer filed in the Supreme Court by another

party in the same case, or filed in the Supreme Court in a connected case wherein a petition for hearing is also pending. No discussion of authorities or argument, however denominated, may be annexed to or filed with the petition or answer, except where such annexed material is page-numbered consecutively with the body of the petition or answer and the total length, including the annexed material, does not exceed the limit established in paragraph (4).

(4) A petition or answer shall not exceed 35 pages if printed or 50 pages if typewritten or produced by other process of duplication, exclusive of the Court of Appeal opinion, index of contents and table of authorities, and any other indices. There shall be no exhibits or appendices, however denominated, annexed thereto or filed therewith other than the opinion of the Court of Appeal and any annexed material permitted by paragraph (3), except that, if it is of unusual significance, an evidentiary exhibit or order of a lower court may be annexed if it does not exceed 10 pages. In all other instances, reference to evidentiary matters and lower court orders shall be by appropriate reference to the record, if they cannot be included in the body of the petition or answer without exceeding the length limitations previously stated. The Chief Justice may permit petitions or answers of greater length, or the inclusion of more annexed material, upon written application.

As amended, effective Nov. 11, 1966; July 1, 1975.

(e) [*Determination of petition*] A hearing in the Supreme Court, after decision in the Court of Appeal, may be granted by an order, signed by at least four judges assenting thereto, and filed with the clerk. The denial of a hearing may be evidenced by an order signed by the Chief Justice and filed with the clerk. If no order is made within the time specified in subdivision (a) of this rule, the petition for hearing shall be deemed denied and the clerk shall enter a notation in the register to that effect. As amended, effective Nov. 11, 1966.

(f) [*Oral argument*] When a hearing is granted, the cause shall be placed on the calendar for oral argument, unless oral argument is waived.

Rule 45. Extension and Shortening of Time.

(a) [*Computation of time*] The time for doing any act required or permitted under these rules shall be computed and extended in the manner provided by the Code of Civil Procedure.

(b) [*Extension by superior court*] The presiding judge of the superior court, or a judge designated by him, for good cause shown on application made as provided in rule 43, may extend the time for doing any act involved in the preparation of the record on appeal in a civil case, prior to the expiration of such time or any valid extension thereof, subject to the following limitations: (1) he may not extend the time for payment of the fee for filing the notice of appeal; (2) extensions granted to either the clerk or the reporter for preparation of the record on appeal shall not exceed 30 days in the aggregate; and (3) extensions granted to any party shall not exceed 30 days in the aggregate, except that upon acceptance of a written stipulation

of the parties filed in the action such extensions may aggregate not to exceed 90 days. Anything in these rules to the contrary notwithstanding, the initial extension granted to any party by the superior court may be granted ex parte. A copy of any order issued under this subdivision and of the stipulation, if any, upon which it was based shall be sent forthwith by the clerk of the superior court to the clerk of the reviewing court.

As amended, effective Jan. 1, 1974; Jan. 1, 1976.

(c) [*Extension of time*] The time for filing a notice of appeal or the granting or denial of a rehearing in the Court of Appeal shall not be extended. The time for the granting or denial of a hearing in the Supreme Court after decision by a Court of Appeal shall only be extended as provided in subdivision (a) of rule 28. The time for the granting or denial of a rehearing in the Supreme Court shall only be extended as provided in subdivision (a) of rule 24.[1] The Chief Justice or Presiding Justice, for good cause shown, may extend the time for doing any other act required or permitted under these rules and may relieve a party from a default for failure to file a timely petition for hearing or rehearing or an answer thereto if the time within which the court must act on the petition has not expired. An application for extension of time shall be made as provided in rule 43. As amended, effective Jan. 1, 1951; Jan 1, 1957; Jan. 1, 1961; Jan. 2, 1962; Nov. 11, 1966.

(d) [*Shortening time*] The Chief Justice or Presiding Justice, for good cause shown, may shorten the time for serving or filing a notice of motion or other

[1]See rule 27.

paper incident to an appeal or an original proceeding in the reviewing court. An application to shorten time shall be made as provided in rule 43.

(e) [*Relief from default*] The reviewing court for good cause may relieve a party from a default occasioned by any failure to comply with these rules, except the failure to give timely notice of appeal. This rule is applicable to any order granting relief from default made after January 1, 1962.

Adopted, effective July 1, 1963.

Rule 46. Papers Violating Rules Not to Be Filed.

No record, brief, or other paper or document which fails to conform to the requirements of these rules shall be filed by the clerk of the reviewing court.

Supreme Court, U. S.
FILED
JUL 8 1977
MICHAEL RODAK, JR., CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1977

No. 76-1739

BRUCE JOHNSON, a minor, by Earl D. Johnson, his guardian *ad litem;* LISA JACKSON, a minor, by Doreen G. Jackson, her guardian *ad litem;* ROBYN DEXTER, a minor, by Alice Dexter, her guardian *ad litem;* and MICHELLE HENROIT, a minor, by A. W. Henroit, her guardian *ad litem,*

Petitioners,

vs.

HUNTINGTON BEACH UNION HIGH SCHOOL DISTRICT, RALPH H. BAUER, as trustee of Huntington Beach Union High School District; RON SHENKMAN, as trustee of Huntington Beach Union High School District; ROBERT A. KNOX, as trustee of Huntington Beach Union High School District; HELEN E. DITTE, as trustee of Huntington Beach Union High School District; DON MCALLISTER, as trustee of Huntington Beach Union High School District; and DOE ONE through DOE TWENTY,

Respondents.

BRIEF AMICUS CURIAE

OF THE CENTER FOR LAW AND RELIGIOUS FREEDOM OF THE CHRISTIAN LEGAL SOCIETY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Of Counsel:

JOHN W. WHITEHEAD
3240 Fay Avenue
Los Angeles, CA 90034
Tel.: (213) 836-5192

ROBERT L. TOMS
Attorney for Amicus Curiae
Center for Law and Religious Freedom of the Christian Legal Society

CALDWELL & TOMS
611 West Sixth Street
Los Angeles, CA 90017
Tel.: (213) 628-1300

TABLE OF CONTENTS

PAGE

Interest of the Center for Law and Religious Freedom of the Christian Legal Society 1

Statement of the Case 2

Argument in Support that Petition for Writ of Certiorari Be Granted 4

I. IN THE CONTEXT OF A PUBLIC HIGH SCHOOL DISTRICT'S ONGOING PROGRAM OF RECOGNIZING STUDENT ORGANIZATIONS AND GRANTING THE USE OF SCHOOL FACILITIES FOR MEETING AND COMMUNICATION TO THOSE STUDENT GROUPS WHICH ARE GRANTED RECOGNITION, THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION DOES NOT REQUIRE THE SCHOOL DISTRICT TO WITHHOLD RECOGNITION OR TO WITHHOLD THE USE OF ITS FACILITIES TO AN APPLICANT STUDENT GROUP BECAUSE THE SUBJECT MATTER OF THE GROUP'S INTEREST IS A RELIGIOUS ONE 4

A. ACCOMMODATING NEUTRALITY PRECLUDES THE APPLICATION OF THE STRICTURES OF THE ESTABLISHMENT CLAUSE IN THIS CASE BEFORE THE COURT 5

B. PREVAILING CASE LAW DEMONSTRATES THAT THE ESTABLISHMENT CLAUSE WOULD NOT BE VIOLATED BY ALLOWING THE PETITIONERS TO MEET AND UTILIZE SCHOOL FACILITIES SINCE GEOGRAPHICAL OCCURRENCE IS OBVIATED BY SHOWING A LACK OF OSTENSIBLE GOVERNMENTAL SUPPORT OF A RELIGIOUS EXERCISE 9

C. THE TRIPARTITE TEST PROMULGATED BY THE UNITED STATES SUPREME COURT TO DETERMINE WHETHER OR NOT THE ESTABLISHMENT CLAUSE HAS BEEN VIOLATED DEMONSTRATES THAT THERE IS NO CONSTITUTIONAL PROHIBITION IN THE DISTRICT'S ALLOWING THE PETITIONERS TO MEET AND UTILIZE THE SCHOOL FACILITIES 13

The principle of *accommodating neutrality* is well stated by Justice William O. Douglas in *Zorach v. Clauson,* 343 U.S. 306, 71 S. Ct. 689, 96 L. Ed. 954 (1952). At 313, Justice Douglas stated:

> "When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and *accommodates* the public service to their spiritual needs." (emphasis added).

The *Engel* and *Schempp* cases did not abandon accommodating neutrality but simply defined some of the limits of accommodation (discussed *infra*).

In *Walz v. Tax Commission,* 397 U.S. 664, 90 S. Ct. 1409, 25 L. Ed. 2d 697 (1970), the present Court reinforced the doctrine of accommodating neutrality by upholding tax exemption for churches. Chief Justice Burger at 669 proclaimed: "Short of those expressly proscribed governmental acts there is room for play in the joints productive of a *benevolent neutrality* which will permit religious exercise to exist without sponsorship and without interference." (emphasis added).

The United States Supreme Court has clearly designated what "proscribed governmental acts" violate the First Amendment when held in the public schools. These are: (1) State directed and required prayer in *Engel;* (2) State directed and required Bible reading in *Schempp;* and (3) State directed and required on-premises religious training in *McCollum v. Board of Education,* 333 U.S. 203, 68 S. Ct. 461, 92 L. Ed. 640 (1948).

In *Walz,* Justice Burger (at 670) specifically noted that adherence "to the policy of neutrality that derives from an *accommodation* of the Establishment and Free Exercise Clauses has prevented the kind of involvement that would tip the balance toward government control of churches or

government restraint with religious practice." (emphasis added). He was also careful to point out that no "perfect or absolute separation is really possible" and that the First Amendment "seeks to mark boundaries to avoid excessive entanglement" between Church and State (at 670).

More recently, in *Roemer v. Board of Public Works of Maryland,* 426 U.S. 736, 96 S. Ct. 2337, 49 L. Ed. 2d 179 (1976), the doctrine of accommodating neutrality was further enhanced by the United States Supreme Court. Four Maryland citizens and taxpayers brought suit challenging the constitutionality (under the Establishment Clause) of a statute providing public aid in the form of noncategorical grants (given in the form of an annual fiscal year subsidy) to eligible colleges and universities. In upholding the state statute, this Court, speaking through Justice Blackmun, said (at 745-46):

> "A system of government that makes itself felt as pervasively as ours could hardly be expected never to cross paths with the church. In fact, our State and Federal governments impose burdens upon, and impart certain benefits to, virtually all our activities, and religious activity is not an exception. The Court has enforced a scrupulous neutrality by the State, as among religious and other activities, *but a hermetic separation of the two is an impossibility it has never required.*" (emphasis added).

Accommodation of students' religious interests which was held to be a permissible governmental activity in *Zorach* was applied by the Supreme Court generally to the field of relations between schools and pupils in *Wisconsin v. Yoder,* 406 U.S. 205, 234, at footnote 22, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972). It was also applied specifically to school premises in *Reed v. Van Hoven,* 237 F. Supp. 48, 53 (1965), and in *Lawrence v. Buchmueller,* 243 N. Y. S. 2d 87, 90 (1963), and was sharply distinguished from "active involvement" with religious matters in the latter decision.

PAGE

1. *There Is A Secular Purpose In Allowing The Petitioners' Bible Study Club To Meet On School Premises And To Utilize School Facilities* 14

2. *The Primary Effect Of Allowing The Petitioners' Bible Study Club To Meet And Use The School Facilities Is Neither The Advancement Nor Inhibition Of Religion* 14

3. *There Is No "Excessive" Entanglement With Religion By Allowing The Petitioners' Bible Study Club To Meet And Utilize The School Facilities* 21

II. ASSUMING THAT THE ESTABLISHMENT CLAUSE IS INVOLVED IN THE FIRST ISSUE, THE RIGHTS SOUGHT TO BE PROTECTED BY THE ESTABLISHMENT CLAUSE ARE OUTWEIGHED BY THE VALUE OF OTHER FIRST AND FOURTEENTH AMENDMENT RIGHTS .. 26

A. THE PETITIONERS' TRADITIONAL FIRST AMENDMENT RIGHTS OF FREE EXPRESSION AND ASSEMBLY CANNOT BE CURTAILED IN THIS CASE BY THE RESPONDENTS WITHOUT VIOLATING THE UNITED STATES CONSTITUTION 27

B. THE PETITIONERS' RIGHT TO THE FREE USE OF A PUBLIC FORUM, A MODERN PENUMBRAL RIGHT OF CONSTITUTIONAL DIMENSION, CANNOT BE RESTRICTED WITHOUT VIOLATING THE UNITED STATES CONSTITUTION 36

C. THE PETITIONERS' RIGHT TO THE EQUAL PROTECTION OF THE LAWS CANNOT BE DENIED WITHOUT VIOLATING THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION 39

D. THE PETITIONERS' RIGHTS TO THE FREEDOM OF RELIGION IS DENIED BY THE RESPONDENT'S REFUSAL TO ALLOW THE APPELLANTS' BIBLE STUDY CLUB TO MEET SINCE THE FREEDOM OF RELIGION TAKES PRECEDENCE OVER THE ESTABLISHMENT CLAUSE WHENEVER THERE IS CONFLICT BETWEEN THE TWO RELIGION CLAUSES OF THE FIRST AMENDMENT (ASSUMING THE ESTABLISHMENT CLAUSE IS EVEN INVOLVED) 41

PAGE

III. IN THE CONTEXT OF AN ONGOING PROGRAM OF RECOGNIZING STUDENT ORGANIZATIONS AND GRANTING USE OF SCHOOL FACILITIES FOR MEETING AND COMMUNICATION PURPOSES, A SCHOOL DISTRICT IS NOT PROHIBITED BY THE CALIFORNIA CONSTITUTION (OR OTHER CALIFORNIA LAW) FROM GRANTING THE SAME PRIVILEGES TO A STUDENT GROUP WITH RELIGIOUS INTERESTS AS ARE GRANTED TO STUDENT GROUPS WITH SECULAR INTERESTS 45

A. ARTICLE IX, SECTION 8, DOES NOT FORBID THE ACTIVITIES PROPOSED BY THE PETITIONERS 45

B. ARTICLE XVI, SECTION 5, DOES NOT FORBID THE ACTIVITIES PROPOSED BY THE PETITIONERS 46

Summary of Argument 49

Conclusion 49

TABLE OF AUTHORITIES CITED

CASES

Abington School District v. Schempp, 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963) 4

Allen v. Hickel, 424 F. 2d 944 (1970) 17

American Civil Liberties Union v. Radford College, 315 F.Supp. 893 (1970) 30

Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 83 S.Ct. 631, 9 L.Ed.2d 584 (1963) 32

Board of Education v. Allen, 392 U.S. 236, 88 S.Ct. 1923, 20 L.Ed.2d 1060 (1968) 19

Braunfield v. Brown, 366 U.S. 599, 81 S.Ct. 1144, 7 L.Ed. 70 (1961) 43

Buckley v. Meng, 230 N.Y.S.2d 924 (1962) 38

California Educational Facilities Authority v. Priest, 12 Cal.3d 593 (1974) 47

Committee for Public Education v. Nyquist, 413 U.S. 756, 93 S.Ct. 2955, 37 L.Ed.2d 948 (1973) 20

CASES (Continued)

	PAGE
Danskin v. San Diego Unified School District, 28 Cal.2d 536 (1946)	37
East Meadow Com. Con. Ass'n v. Board of Ed., 272 N.Y.S. 2d 341 (1966)	38
Edwards v. South Carolina, 372 U.S. 229, 83 S.Ct. 680, 9 L.Ed.2d 697 (1963)	25
Engel v. Vitale, 370 U.S. 421, 82 S.Ct. 1261, 8 L.Ed.2d 601 (1962)	4
Evans v. Selma Union High School District, 193 Cal. 54 (1924)	46
Everson v. Board of Education, 330 U.S. 1, 67 S.Ct. 504, 91. L.Ed. 711 (1947)	20
Frohliger v. Richardson, 63 Cal. App. 209 (1923)	47
Gallagher v. Crown Kosher Super Market, 366 U.S. 617, 81 S.Ct. 1122, 6 L.Ed.2d 536 (1961)	19
Garvin v. Rosenau, 455 F.2d 233 (1972)	30
Gay Students Organization v. Bonner, 509 F.2d 652 (1974)	31
Gordon v. Board of Education, 78 Cal.App.2d 464 (1947)	46
Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965)	35
Grossberg v. Deusebio, 380 F.Supp. 285 (1974)	**13**
Healy v. James, 408 U.S. 169, 92 S.Ct. 2338, 33 L.Ed.2d 266 (1972)	9
Holt v. Thompson, 66 Wis.2d 659, 225 N.W.2d 678 (1975)	20
Hudson v. Harris, 478 F.2d 244 (1973)	30
Hunt v. Board of Education of Kanawha County, 321 F.Supp. 1263 (1971)	38
Hunt v. McNair, 413 U.S. 734, 93 S.Ct. 2868, 37 L.Ed.2d 923 (1973)	17
James v. Nelson, 349 F.Supp. 1061 (1972)	39
Keegan v. University of Delaware, ... Del. ...., 349 A.2d 14 (1975), *cert. denied*, 44 U.S. Law Week, 3473 (1976)	8
Kunz v. New York, 340 U.S. 290, 71 S.Ct. 312, 95 L.Ed. 267 (1951)	15
Lamont v. Postmaster General, 381 U.S. 301 85 S.Ct. 1493, 14 L.Ed.2d 398 (1965)	34

CASES (Continued)

	PAGE
Lawrence v. Buchmueller, 243 N.Y.S.2d 87 (1963)	7
Lawrence University Bicentennial Commission v. City of Appleton, 409 F.Supp. 1319 (1976)	35
Lemon v. Kurtzman, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971)	13
Los Angeles County v. Kirk, 148 Cal. 385 (1905)	45
Martin v. City of Struthers, 319 U.S. 141, 63 S.Ct. 862, 87 L.Ed. 1313 (1943)	34
McCollum v. Board of Education, 333 U.S. 203, 68 S.Ct. 461, 92 L.Ed. 649 (1948)	6
McGowan v. Maryland, 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961)	19
Meek v. Pittinger, 421 U.S. 349, 95 S.Ct. 1753, 44 L.Ed.2d 217 (1975)	22
N.A.A.C.P. v. Alabama, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958)	27
National Socialist etc. Party v. Ringers, 473 F.2d 1010 (1973)	38
Near v. Minnesota, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1931)	32
New York Times v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964)	34
Niemotko v. Maryland, 340 U.S. 268, 71 S.Ct. 325, 95 L.Ed. 267 (1951)	15
O'Hair v. Paine, 312 F.Supp. 434 (1969), *affirmed per curiam* 432 F.2d 66 (1970), *cert. denied*, 401 U.S. 955 (1971)	14
Police Department of Chicago v. Mosley, 408 U.S. 92, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972)	32
Red Lion Broadcasting Co. v. FCC., 395 U.S. 367, 89 S.Ct. 1794, 23 L.Ed.2d 371 (1969)	35
Reed v. Van Hoven, 237 F.Supp. 48 (1965)	7
Roemer v. Board of Public Works of Maryland, 426 U.S. 736, 96 S.Ct. 2337, 49 L.Ed.2d 179 (1976)	7
Saia v. New York, 334 U.S. 558, 61 S.Ct. 1148, 92 L.Ed. 1574 (1948)	15

CASES (Continued)

	PAGE
Schneider v. State, 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 155 (1939)	40
Scoville v. Board of Education, 425 F.2d 10 (1970)	28
Sherbert v. Verner, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963)	42
Smith v. Smith, 523 F.2d 121 (1975), *cert. denied*, 423 U.S. 1073 (1976)	16
Snyder v. Board of Trustees etc., 286 F.Supp. 927 (1968)	38
Stacy v. Williams, 306 F.Supp. 963 (1969)	12
Stanley v. Georgia, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969)	35
Thomas v. Collins, 323 U.S. 516, 65 S.Ct. 315, 89 L.Ed. 430 (1945)	40
Tinker v. Des Moines School District, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969)	28
Two Guys v. McGinley, 366 U.S. 582, 81 S.Ct. 1145, 6 L.Ed.2d 551 (1961), *reh. denied*, 368 U.S. 869, 82 S.Ct. 21, 7 L.Ed.2d 69 (1961)	19
Vail v. Board of Education, 354 F.Supp. 592 (1973)	35
Walz v. Tax Commission, 397 U.S. 664, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970)	6
Wilson v. Chancellor, 418 F.Supp. 1358 (1976)	35
Wisconsin v. Yoder, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972)	7
Wood v. Davison, 351 F.Supp. 543 (1972)	30
Wood v. Mt. Lebanon Township School District, 342 F.Supp. 1293 (1972)	12
Wood, In re, 108 Cal.App. 694 (1930)	46
Zorach v. Clauson, 343 U.S. 306, 71 S.Ct. 689, 96 L.Ed. 954 (1952)	6

STATUTES (United States)

United States Constitution, First Amendment	4
United States Constitution, Fourteenth Amendment	39

STATUTES (California)

	PAGE
Education Code, Section 30301 et seq.	47
Education Code, Section 10704	22
California Constitution, Art. IX, Section 8	45
California Constitution, Art. XIII, Section 24	47
California Constitution, Art. XVI, Section 5	45

RULES (California)

Rules of Court	
Rule 28(a)	3
Rule 45	3

MISCELLANEOUS TEXTS

37 Opinions of California Attorney General 105 (1961)	47
Black's Law Dictionary, 4th Ed.	5
Oxford English Dictionary (Oxford U. Press: 1933), Vol. 1	5
Clark, *The Church and the State — Its History and Relationship*, from Religion and the Public School (Wartburg College, Waverly, Iowa, 1964)	52
Constitutional Law — Religious Exercises and The Public Schools, 20 Arkansas Law Review 320 (1967)	4, 5
Green, *The Right to Communicate*, 35 N.Y.U. Law Review 903 (1960)	35
Kauper, *The Supreme Court and The Establishment Clause: Back to Everson?*, 25 Case Western Reserve Law Review 107 (1974)	17
Kurland, *The Supreme Court, Compulsory Education, and The First Amendment's Religion Clauses*, 75 West Virginia Law Review 213 (1973)	5
Louisell and Jackson, *Religion, Theology and Public Higher Education*, 50 California Law Review 751 (1962)	45
Meiklejohn, *Political Freedom* (1965)	35
Murphy, *The Prior Restraint Doctrine in the Supreme Court: A Reevaluation*, 51 Notre Dame Lawyer 898 (1976)	32

MISCELLANEOUS (Continued)

	PAGE
Pfeffer, *The Supremacy of Free Exercise*, Georgetown Law Journal 1115 (1973)	43
Prior Restraints in Public High Schools, 82 Yale Law Journal 1325 (1973)	33
Recent Decisions — First Amendment — Prior Restraint, 35 Maryland Law Review 512 (1976)	33
Religious Rights of Public School Teachers, 23 UCLA Law Review 763 (1976)	41
Students' Constitutional Rights in Public Secondary Education, 14 Washburn Law Journal 106 (1975)	34
Swartz, *No Imposition of Religion: The Establishment Clause*, 77 Yale Law Journal 692 (1968)	43
The Constitutionality of The 1972 Amendment To Title VII's Exemption For Religious Organizations, 73 Michigan Law Review 538 (1975)	5
The Right to Receive, 63 Georgetown Law Journal 775 (1975)	34
Warren, *A Republic if You Can Keep It* (1972)	36

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1977

No. .....

BRUCE JOHNSON, a minor, by Earl D. Johnson, his guardian *ad litem;* LISA JACKSON, a minor, by Doreen G. Jackson, her guardian *ad litem;* ROBYN DEXTER, a minor, by Alice Dexter, her guardian *ad litem;* and MICHELLE HENROIT, a minor, by A. W. Henroit, her guardian *ad litem,*

Petitioners,

vs.

HUNTINGTON BEACH UNION HIGH SCHOOL DISTRICT, RALPH H. BAUER, as trustee of Huntington Beach Union High School District; RON SHENKMAN, as trustee of Huntington Beach Union High School District; ROBERT A. KNOX, as trustee of Huntington Beach Union High School District; HELEN E. DITTE, as trustee of Huntington Beach Union High School District; DON MCALLISTER, as trustee of Huntington Beach Union High School District; and DOE ONE through DOE TWENTY,

Respondents.

BRIEF AMICUS CURIAE

OF THE CENTER FOR LAW AND RELIGIOUS FREEDOM
OF THE CHRISTIAN LEGAL SOCIETY
IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

INTEREST OF THE CENTER FOR LAW AND RELIGIOUS FREEDOM OF THE CHRISTIAN LEGAL SOCIETY

The Center for Law and Religious Freedom of the Christian Legal Society is a non-profit corporation organized under the laws of the State of Illinois and composed of attorneys, judges, law students, educators and other citi-

zens dedicated to the protection of religious liberty. Among its objectives are to promote, assure and enhance the freedom of Christians in the proper exercise of their faith in conformity with the guarantees of the United States Constitution.

In accordance with its objectives the Center for Law and Religious Freedom of the Christian Legal Society through its Advisory Board evaluates and defines constitutional issues, collects research data relating to those issues, and determines whether a particular issue is worthy of support. Its national membership and professional resources thus enable the Center for Law and Religious Freedom of the Christian Legal Society to focus public attention on unconstitutional incursions upon religious freedom that would otherwise go unrecognized. Because of its acute awareness concerning unconstitutional violations of the freedom of religion, it has increasingly become one of the nation's most effective and responsible commentators in this important field.

The Center for Law and Religious Freedom of the Christian Legal Society has a vital interest in seeking review of the lower court's decision, which if left undisturbed would allow unconstitutional curtailments upon priceless First and Fourteenth Amendment guarantees. Petitioners and Respondents have consented to the filing of this brief (written contents have been filed with the Clerk).

STATEMENT OF THE CASE

Petitioners' (high school students) complaint sought injunctive and declaratory relief in the Superior Court of Orange County in the State of California. The Complaint was directed against the Respondent school district to permit a voluntary student Bible study club to meet and conduct its activities on the public high school campus during the regular school day. Specifically, Petitioners sought to establish their rights (1) to official club recognition, (2) to use school classrooms and other space during the

school day for club meetings, (3) to use bulletin boards and similar facilities for the posting of club activities, and (4) to have access to the school newspaper for purposes of publicizing club events.

The relief sought by Petitioners was denied, and a judgment was entered by the Superior Court decreeing that the district was prohibited from recognizing Petitioners' Bible study club or from assisting Petitioners in their efforts to form a religious club. The Superior Court decision was affirmed by the Court of Appeal for the Fourth District, Second Division, of the State of California on March 11, 1977 (Justice McDaniel dissenting). A timely Petition for Rehearing was denied on March 30, 1977.

A Petition for Hearing before the California Supreme Court (a court of discretion) was filed on April 21, 1977, one day late under the Rules of Court, Rule 28(a), and based on said late filing the California Supreme Court refused the Petition for Hearing. On the same day the filing was refused, counsel for Petitioners submitted a request for relief from default under the provisions of Rules of Court, Rule 45. Said relief was denied on April 25, 1977.

On May 6, 1977, counsel for Petitioners filed a petition requesting the California Supreme Court to grant a hearing on its own motion pursuant to Rule 28(a), with points and authorities in support thereof. Under the provisions of Rule 28(a), the California Supreme Court has the authority to exercise jurisdiction and grant hearing on its own motion within 30 days after the decision of the appellate court becomes final. The California Supreme Court ignored the request and refused to hear the matter on its own motion.

Counsel for Petitioners having made a request that the matter be heard under Rules of Court which allow the Supreme Court of California to exercise jurisdiction by hearing the matter on its own motion, and the California Supreme Court having refused to exercise that jurisdiction within its power, the jurisdiction of this matter is preserved

in that all state remedies have been exhausted and the decision of the Court of Appeal is that of the court of last resort.

ARGUMENT IN SUPPORT THAT PETITION FOR WRIT OF CERTIORARI BE GRANTED

The decision below raises issues of great constitutional importance. In this brief we show that the lower court's decision on the merits is in direct conflict with the First and Fourteenth Amendments to the United States Constitution as well as recent decisions rendered by the United States Supreme Court and lower federal courts. If the lower court's decision is left undisturbed it would be effective in denying fundamental rights guaranteed by the United States Constitution to the high school students involved as well as the constitutional rights of countless other students within and without the State of California.

I

IN THE CONTEXT OF A PUBLIC HIGH SCHOOL DISTRICT'S ONGOING PROGRAM OF RECOGNIZING STUDENT ORGANIZATIONS AND GRANTING THE USE OF SCHOOL FACILITIES FOR MEETING AND COMMUNICATION TO THOSE STUDENT GROUPS WHICH ARE GRANTED RECOGNITION, THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION DOES NOT REQUIRE THE SCHOOL DISTRICT TO WITHHOLD RECOGNITION OR TO WITHHOLD THE USE OF ITS FACILITIES TO AN APPLICANT STUDENT GROUP BECAUSE THE SUBJECT MATTER OF THE GROUP'S INTEREST IS A RELIGIOUS ONE.

Mr. Justice Clark, realizing the danger in oversweeping interpretations of the decision rendered by this Honorable Court in *Engel v. Vitale,* 370 U.S. 421, 82 S. Ct. 1261, 8 L. Ed. 2d (1962), declared: "Most commentators suggested that the court had outlawed religious observances in public schools when, in fact, the court did nothing of the kind" (*Constitutional Law — Religious Exercises and the Public Schools,* 20 Arkansas Law Review 320, 325-26, footnote 44). Shortly thereafter, Justice Clark authored the opinion in *Abington School District v. Schempp,* 374 U.S. 203, 83 S.

Ct. 1560, 10 L. Ed. 2d 844 (1963), which, although striking down a state required and directed religious exercise, continued the spirit of *accommodation* that has been present in this Court's decisions interpreting the religion clauses of the First Amendment.

A. ACCOMMODATING NEUTRALITY PRECLUDES THE APPLICATION OF THE STRICTURES OF THE ESTABLISHMENT CLAUSE IN THIS CASE BEFORE THE COURT.

It has been recognized by various commentators, including Professor Phillip B. Kurland, that this Court has most definitely rejected the strict neutrality approach as it relates to the Establishment Clause (Kurland, *The Supreme Court, Compulsory Education, and The First Amendment's Religion Clauses,* 75 West Virginia Law Review 213, 237). Instead, the approach that has been adopted by the Court has been termed "accommodating neutrality" (*Constitutional Law — Religious Exercises and the Public Schools,* 20 Arkansas Law Review 320, 325). The term "accommodation" inherently denotes a meaning of "favor", "obliging" and/or amiableness toward a designated object, in this case, toward the free exercise of religion (Black's Law Dictionary, 4th Ed., 32-33; The Oxford English Dictionary (Oxford U. Press: 1933) Vol. 1, 59). In fact, one commentator has specifically noted that this approach to the Establishment Clause permits "accommodation to and preferment of religion in order to safeguard free exercise values" (*The Constitutionality of the 1972 Amendment to Title VII's Exemption for Religious Organizations,* 73 Michigan Law Review 538, 551).

This Court's *accommodating neutrality* approach in essence holds that the First Amendment was intended to maintain a proper relationship between the government and religion, and although the "wall of separation" is present it is not an impregnable wall. Therefore, not all relationships between government and religion are unconstitutional. Instead, the State can accommodate (or oblige) religion in certain ways.

Very recently in *Keegan v. University of Delaware,* .... Del. ...., 349 A. 2d 14 (1975), *cert. denied,* 44 U.S. Law Week. 3473 (1976), the Supreme Court of Delaware ruled that the Establishment Clause would not be violated by a state university allowing regular student worship services in the commons rooms of its dormitories. The court at 16 stated:

> "The Establishment cases decided by the United States Supreme Court indicate that neutrality is the safe harbor in which to avoid First Amendment violations: neutral 'accommodation' of religion is permitted [citations including the *Zorach* case] while 'promotion' and 'advancement' are not [citations including the *McCollum* case]."

It must be noted that Justice Douglas sensed the peril of the strict neutrality approach in *Zorach*. At 313, Douglas commented on the probable result if the State were not to accommodate religion:

> "To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe . . . But we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence."

In *Schempp,* Justice Goldberg indicated that strict neutrality leads to hostility, and in taking the position of accommodation himself, he remarked at 306:

> "Untutored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of that noninterference and noninvolvement with the religious which the Constitution commands, but a broadening and pervasive devotion to the secular and a passive or even active, hostility to the religious.

> Such results are not only not compelled by the Constitution, but, it seems to me, are prohibited by it."

Justice Clark in *Schempp* (at 255) specifically pointed out that the State may not establish a "religion of secularism" in the public schools. Citing *Zorach,* Clark indicated that such a religion of secularism is established when the school system affirmatively opposes or exhibits hostility to religion, thus "preferring those who believe in no religion over those who do believe" (citing *Zorach,* supra, at 314).

Amicus curiae sincerely believes that one group or club has been singled out in this case and has been banned from meeting by the district. Those who are allowed to meet on the public school campus are preferred over the Petitioners, thereby actively opposing and showing hostility toward them. This is a form of subtle discrimination that has been a nemesis in varying forms throughout the history of the United States. It is this type of discrimination that the United States Constitution so vehemently prohibits.

B. PREVAILING CASE LAW DEMONSTRATES THAT THE ESTABLISHMENT CLAUSE WOULD NOT BE VIOLATED BY ALLOWING THE PETITIONERS TO MEET AND UTILIZE SCHOOL FACILITIES SINCE GEOGRAPHICAL OCCURRENCE IS OBVIATED BY SHOWING A LACK OF OSTENSIBLE GOVERNMENTAL SUPPORT OF A RELIGIOUS EXERCISE.

In a brief concurring opinion in *Healy v. James,* 408 U.S. 169, 203, S. Ct. 2338, 33 L. Ed. 2d 266 (1972), Mr. Justice Rehnquist wrote: "Prior cases dealing with the First Amendment rights are not fungible goods . . ." *Amicus curiae* believes that this observation is especially appropriate when one has in view the two Religion Clauses of the First Amendment. Concerning these two particular clauses the United States Supreme Court, in *Walz, supra,* at 668, emphasized the danger in assuming that broad language is transferable from one class of cases to another class of cases:

> "The considerable internal inconsistency in the opinions of the Court derives from what, in retrospect, may

> have been too sweeping utterances on aspects of these clauses that seemed clear in relation to particular cases but have limited meaning as general principles."

Amicus curiae submits that the statement just quoted was given to alert parties, counsel and judges that specific application of general statements made in connection with one group of cases (e.g., those involving the expenditure of thousands or millions of dollars of tax money to aid institutional religion) will often vary from the application of those same statements when made in cases whose context is entirely different (e.g., those involving the accommodation by a state-supported school of the religious interests of its students).

There have been only four definitive opinions — *McCollum, Zorach, Engel* and *Schempp, supra* — handed down by the United States Supreme Court dealing with religious activities in the public school system. In three of these opinions — *McCollum, Engel* and *Schempp* — this Court ruled that public schools cannot *require* that religious activities be conducted on school premises (thereby *actively* and officially *sponsoring* such activities). In the fourth case, *Zorach,* this Court emphasized that there is no constitutional prohibition against public school *accommodation* of the religious interests of the students (e.g., allowing a Bible club to meet).

In the *McCollum, Engel* and *Schempp* cases, the religious activities were *curricular* in nature. In each it appeared to the school children that the State stood behind the ideological content of the doctrinal teaching or exercise. In each the government was actively *sponsoring* religion and *mandating* that religious exercises be conducted on its premises. The religious activities involved in *Zorach,* on the contrary, were not curricular in nature, were not mandated and required by the State (but were voluntary as in our fact situation) and there was no appearance that the State backed or sponsored the activities. Therefore, the religion was accommated in *Zorach.*

Under many circumstances the State may *accommodate* an activity which it could not sponsor. The *Zorach* decision is illustrative of this principle. In *Zorach* the arrangement was like that in *McCollum* except the weekly religious instruction was not held in the classrooms and the instructors were not under the control of the Superintendent. It was held that this was *not* an establishment of religion.

The fact that *Zorach* approved off-campus activities similar to those which *McCollum* had forbidden in an on-campus situation has given rise to the simplistic notion that the only operative fact under the Establishment Clause is the place of the activity. However, Mr. Justice Brennan's concurring opinion in *Schempp* exploded this concept. Brennan pointed out (at 262) that the "deeper difference was that the *McCollum* program placed the religious instructor in the public school classroom in precisely the position of authority held by the regular teachers of secular subjects while the *Zorach* program did not." He continued (at 263):

> "To be sure, a religious teacher presumably commands substantial respect and merits attention to his own right. But the Constitution does not permit that prestige and capacity for influence to be augmented by investiture of all the symbols of authority at the command of the lay teacher for the enhancement of secular instruction."

Justice Brennan is not alone in his analysis. In a concurring opinion in *McCollum, supra,* four justices (and in particular Justice Felix Frankfurter) stated that the vice in the Champaign, Illinois, program was (at 230):

> "The momentum of the whole school atmosphere and school planning is presumably put behind religious instruction, as given in Champaign, precisely in order to secure for the religious instruction such momentum and planning."

Justice Douglas in *Zorach* (at 315) distinguished *McCollum* on the ground that in the latter case "the classrooms

were used for religious instruction and *the force of the public school was used to promote that instruction.*" (emphasis added).

The *Zorach* Court was utilizing the word "classroom" in the sense of a teaching unit, not in the sense of a geographic location. An emphasis on mere geography cannot be squared with the emphasis upon "prestige and capacity for influence" in Justice Brennan's concurrence in *Schempp*, or with the emphasis upon "momentum of the whole school atmosphere" in Justice Frankfurter's above-quoted concurrence in *McCollum*, or with the emphasis upon "the force of the public school" as the ultimate factor in the *Zorach* Court's characterization of *McCollum*. (In this connection, it should be noted that the proposed charter of the student Bible study club sought by the Petitioners herein affirmatively required that both before and after each of its meetings an announcement be made that the views therein expressed were not those of the school.)

The results of the post-*Schempp* decisions of state courts and lower federal courts also demonstrate the lack of significance of mere geography. In *Reed v. Van Hoven, supra*, at 53, a federal district court upheld a truly voluntary on-campus prayer program which did not appear to have the imprimatur of the school. In *Stacy v. Williams*, 306 F. Supp. 963, 975-76 (1969), a three-judge federal court held invalid (on Equal Protection grounds) a University of Mississippi regulation which singled-out and forbade on-campus religious meetings, pointing out (at 974) that the University's approval of any activity can easily be negated by merely announcing at the time that the university did not necessarily subscribe to its content. In *Lawrence v. Buchmueller, supra*, a New York court found no Establishment Clause violation in a creche being allowed on school property under circumstances where (at 90-91) "[u]nlike *Engel* . . or . . . *Schempp* . . . which concerned active involvement by Government in religious exercises, the present case constitutes, at most a passive accommodation to religion." In *Wood v. Mt. Lebanon Township School District*,

342 F. Supp. 1293, 1295 (1972), a federal district court found no Establishment Clause violation in *allowing* invocational and benedictional prayers to be said in on-campus graduation ceremonies where there was no "semblance of governmental establishment or even condonation." In *Grossberg v. Deusebio*, 380 F. Supp. 285 (1974), again, a federal district court found no Establishment Clause problem in *allowing* audible prayers to be said during invocation and benediction during a public high school graduation ceremony.

The cases clearly demonstrate that lack of ostensible government support will obviate any Establishment Clause difficulties arising purely from geographical considerations. This is a fact that is determinative in the Petitioners' case since the school district has openly prohibited the Petitioners from meeting and has defended its position concerning said prohibition in this suit. The actions on the part of the Respondents clearly indicate not only to this Honorable Court but to the public at large that the district does not pretend to sanction (or support) in any manner the Petitioners' Bible club.

C. THE TRIPARTITE TEST PROMULGATED BY THE UNITED STATES SUPREME COURT TO DETERMINE WHETHER OR NOT THE ESTABLISHMENT CLAUSE HAS BEEN VIOLATED DEMONSTRATES THAT THERE IS NO CONSTITUTIONAL PROHIBITION IN THE DISTRICT'S ALLOWING THE PETITIONERS TO MEET AND UTILIZE THE SCHOOL FACILITIES.

During the past five years this High Court has developed a tripartite test to determine whether or not the Establishment Clause has been violated by a statute (or, as it herein claimed, by a non-statutory governmental program). In *Lemon v. Kurtzman*, 403 U.S. 602, 612-13, 91 S.Ct. 2105, 29 L. Ed. 2d 745 (1971), this Court stated:

> "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.' "

1. There Is A Secular Purpose In Allowing The Petitioners' Bible Study Club To Meet On School Premises And To Utilize School Facilities.

The lower court conceded that the district allowing the Bible club to meet would be secular in purpose. *Amicus curiae* contends that this conclusion of law is well founded in this particular fact situation. To assume that the purpose of allowing a Bible study club, along with the others allowed under the district's ongoing program of accommodating all kinds of student organizations, is a religious one would be to misunderstand whose "purpose" is under consideration. In *O'Hair v. Paine,* 312 F. Supp. 434 (1969), *affirmed per curiam,* 432 F. 2d 66 (1970), *cert. denied,* 401 U.S. 955 (1971), the plaintiff asked a federal court to restrain NASA (a government agency) from suffering the astronauts to broadcast religious "ceremonies" of the type which were broadcast during the Apollo 8 and Apollo 11 flights. The court, however, ruled against her, saying (at 437): "The purpose of NASA is obvious, it is solely to *accommodate* the astronauts". (emphasis added). NASA had a secular purpose (to put a man on the moon), and in the carrying out of that secular purpose NASA found it reasonable to make this *accommodation.* The Respondent district also possessed a secular purpose (to permit the interchange of ideas among students by means of student clubs) which could include the accommodation of the religious interests of its students without involving the district in religious purposes.

2. The Primary Effect Of Allowing The Petitioners' Bible Study Club To Meet And Use The School Facilities Is Neither The Advancement Nor Inhibition Of Religion.

As to the second prong of the tripartite test, *amicus curiae* asserts that merely *allowing* a religious group to have a religious meeting on a piece of public property (which has been found by the officials in charge to be appropriate for meetings generally) is not an "advancement" of religion within the meaning of the decisions interpreting

the Establishment Clause. Quite to the contrary, the United States Supreme Court has, on at least three occasions — *Saia v. New York,* 334 U.S. 558, 61 S. Ct. 1148, 92 L.Ed. 1574 (1948), *Kunz vs. New York,* 340 U.S. 290, 71 S. Ct. 312, 95 L.Ed. 267 (1951) and *Niemotko v. Maryland,* 340 U.S. 268, 71 S. Ct. 325, 95 L.Ed. 267 (1951) — held that under such circumstances the State may allow religious meetings in its public parks. If the Establishment Clause were considered by the Supreme Court in these cases, then these cases must be taken to hold that Establishment Clause "advancement of religion" does not arise from the *mere use* of public property for religious meetings. In at least two of these decisions the Establishment Clause issue was considered. The point was raised in *Kunz v. New York, supra,* by the dissenting opinion of Mr. Justice Jackson (at 311, footnote 10) who urged that *McCollum* had held that "the Constitution will not suffer tax-supported property to be used to propagate religion." The Court had been confronted with this argument in this context three years before *Kunz* in *Saia, supra,* where, again, Justice Jackson (at 569) had also dissented on the basis that "only a few weeks ago [in *McCollum*] we held that the Constitution prohibits a state or municipality from using tax-supported property 'to aid religious groups to spread their faith'."

The rationale that *McCollum* controls in this case was considered and rejected by this Court in *Kunz* and *Saia* and, inasmuch as *Niemotko, supra,* was decided the same day as *Kunz,* presumably also in *Niemotko.* While public parks are more obviously a natural place for meetings than an otherwise unused school room, it is equally obvious that the district itself has determined (as have probably more than 95% of the country's high school districts) that its otherwise unused school rooms are appropriate places to be utilized by groups of students with common interests as places in which to have meetings and exchange ideas. Having created a forum for such purposes, the district does not "advance religion" impermissibly by accommodating the religious interests of groups of its students in

the unused-school-room forum any more than a park commission would "advance religion" impermissibly by accommodating the religious interests of groups of its citizens in the unused-portion-of-a-city-park forum.

One cannot ignore the analysis that in *all* of the three United States Supreme Court decisions (*McCollum, Engel* and *Schempp*) in which religious activities in a public school setting were held to violate the Establishment Clause — in *all* of them — the school board had *decreed* that these religious activities *must be held,* whereas in the fourth decision (*Zorach*) the school board *only allowed* the religious activity to exist within the public school student's permitted activities. This Court properly held this did not violate the Establishment Clause.

If religion is not advanced (in the constitutional sense) by students being allowed to devotionally study the Bible during curricular hours in a *Zorach*-type program — and that is what *Zorach* held (according to *Smith v. Smith,* 523 F. 2d 121, 125 (1975), *cert. denied,* 423 U.S. 1073 (1976)) — then *amicus curiae* asserts that religion is in fact not advanced (in the constitutional sense) by students being allowed to devotionally study the Bible on their own free time in an otherwise unused school room. The only possible way one can assume the position that religion is so advanced in this particular case is to contend the only operative fact is that government property is being utilized. This is a position which is inconsistent with the United States Supreme Court's rulings in *Saia, Kunz* and *Niemotko, supra,* and it is also contrary to the principle without which those cases could not have been decided as they were: that there is establishment in sponsorship (active involvement) but not in neutral accommodation.

As to financial aid under the second portion of the test, it has been argued that the Establishment Clause would be violated if students of a Bible club were permitted to meet in an otherwise unused school room on their free time during the school day because they would be utilizing a

school room rent free while receiving heat and light and being monitored by a paid faculty sponesor. (The assertion that the district would be "obligated" at its expense to audit any club finances is in error because Education Code, section 10704 does not require such an audit but leaves this decision up to the discretion of the school district.) *Amicus curiae* believes this position to be a purely *de minimis* argument. In *Allen v. Hickel,* 424 F. 2d 944, 949 (1970), a United States Court of Appeals rejected the *de minimis* argument:

> "The duty of the courts is to strike the proper balance. The area is a sensitive one, involving questions of degree. The question is not whether there is any religious effect at all but rather *whether that effect, if present, is substantial.*" (emphasis added).

This Court in *Hunt v. McNair,* 413 U.S. 734, 743, 93 S.Ct. 2868, 37 L.Ed. 2d 923 (1973), emphasized that *direct* funding of a religious activity "in an otherwise substantially secular setting" is the prohibition of the Establishment Clause. The late Professor Paul G. Kauper correctly commented that the issue turns "on whether the law or program is a direct and immediate aid to religion as opposed to an indirect and incidental aid" (Kauper, *The Supreme Court and The Establishment Clause: Back to Everson?,* 25 Case Western Reserve Law Review 107, 120). Kauper (at 126) contends that the direct and immediate criteria is that criteria utilized by the Supreme Court in its parochiaid cases (in apparent agreement with Professor Kauper is 73 Michigan Law Review 538, 547, *supra*). Another commentator asserts that a finding of an establishment violation on the grounds of utilization of a schoolroom for religious discussion and/or study alone is unwarranted since there is no governmental aid provided "so long as the room facilities are equally open to all" (*Religious Rights of Public School Teachers,* 23 UCLA Law Review 763, 787, 788).

As Justice Douglas pointed out in *Engel, supra* (at 437): "Our system at the federal and state level is presently honeycombed with" government financing. Douglas then listed some of those federal governmental financial aids to religion (at 437, footnote 1):

> "[T]he very First Congress which wrote the First Amendment provided for chaplains in both Houses and in the armed services . . . The President issues religious proclamations. The Bible is used for the administration of oaths. N.Y.A. and W.P.A. funds were available to parochial schools during the depression. Veterans receiving money under the "G.I." Bill of 1944 could attend denominational schools, to which payments were made directly by the government. During World War II, federal money was contributed to denominational schools for the training of nurses. The benefits of the National School Lunch Act are available to students in private as well as public schools. The Hospital Survey and Construction Act of 1946 specifically made money available to non-public hospitals. The slogan "In God We Trust" is used by the Treasury Department, and Congress recently added God to the pledge of allegiance. . . . Religious organizations are exempt from the federal income tax and are granted postal privileges. Up to defined limits . . . contributions to religious organizations are deductible for federal income tax purposes . . . made under the federal gift and estate tax laws. . . ."

This list of governmental financial aid could easily be expanded by examining the individual states and their various programs designed to accommodate (aid) religion. Moreover, the crier who opens each session of this Honorable Court by asking God's blessing upon this Court is paid a salary with public funds. All of these governmental aids to religion, however, have not been held to be advancements of religion. Obviously, if such governmental aid is not an unconstitutional advancement of religion, then the negligible expense involved in the present case by allowing

the Petitioners' Bible club to meet does not have the primary effect of advancing a religion.

A clear cut standard has emerged from the United States Supreme Court decisions which has come to be known as the "incidental benefit rule" which *amicus curiae* believes is a controlling factor in the Petitioners' case. This Court has uniformly followed the rule that a law or program protecting a valid secular interest (both lower courts in this case have ruled that there is a valid secular purpose in this case) is not invalid as one "respecting an establishment of religion" merely because it also incidentally benefits one or more, or all religions, or because it incidentally enhances the capability of religion or religious institutions to survive in society. *Amicus curiae* believes the true secular interest that should be protected in this case is the right of the Petitioners to the freedom of speech and association as well as the right to equal protection under the law as guaranteed by the First and Fourteenth Amendments (discussed in detail *infra*).

Utilizing the incidental benefit rule, the various State Sunday closing laws have been upheld by the Supreme Court in *McGowan v. Maryland,* 366 U.S. 420, 81 S. Ct. 1101, 6 L.Ed 393 (1961), *Gallagher v. Crown Kosher Super Market,* 366 U.S. 617, 81 S.Ct. 1122, 6 L.Ed. 2d 536 (1961) and *Two Guys v. McGinley,* 366 U.S. 582, 81 S. Ct. 1145, 6 L.Ed. 2d 551 (1961), *reh. denied,* 368 U.S. 869, 82 S. Ct. 21, 7 L.Ed. 2d 69 (1961).

Upholding a state law apportioning state funds to school districts for the purpose of purchasing textbooks to be lent to all students, including students attending parochial schools, this Court, in *Board of Education v. Allen,* 392 U.S. 236, 88 S. Ct. 1923, 20 L.Ed. 2d 1060 (1968), recognized the possibility that free textbooks would make it more likely that some children would choose to attend a sectarian school. Nevertheless, the Court held that such a likelihood did not by itself demonstrate an unconstitutional degree of support for a religious institution, nor constitute an estab-

lishment of religion. Similar views were expressed by this Court with regard to a state's provision of bus transportation for parochial school pupils in *Everson v. Board of Education,* 330 U.S. 1, 67 S. Ct. 504, 91 L.Ed. 711 (1947).

In *Hunt v. McNair, supra,* this Court rejected the proposition that the Establishment Clause prohibits any State program which in some way aids an institution with a religious affiliation while refusing to accept the argument that all governmental aid to religion is forbidden. In this case the Court upheld a financing arrangement for revenue bonds sold for the purpose of assisting in the financing of the construction of buildings at sectarian South Carolina schools that were not to be utilized for religious purposes or instruction. This same reasoning was also present in *Committee for Public Education and Religious Liberty v. Nyquist,* 413 U.S. 756, 93 S.Ct. 2955, 37 L.Ed. 2d 948 (1973), where a state statute was struck down because it provided "direct and immediate aid" for sectarian purposes (this Court made the distinction between incidental and direct aid to religion, e.g., see *Kauper, supra,* at 120). Moreover, the most recent case concerning State aid as only an incidental benefit to religion is *Roemer v. Board of Public Works of Maryland, supra,* in which this Court, speaking through Justice Blackmun, stated (at 747):

> "*Everson* and *Allen* put to rest any argument that the State may never act in such a way that has the *incidental effect of facilitating religious activity* . . . If this were impermissible . . . a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair. The Court never has held that religious activities must be discriminated against in this way." (emphasis added).

Finally, in a case which illustrates both accommodating neutrality and the incidental benefit rule, the Wisconsin Supreme Court in *Holt v. Thompson,* 66 Wis. 2d 659, 225 N.W. 2d 678 (1975), upheld a released time religious activity (similar to that in *Zorach*) that involved a financial

expense in the filing of monthly attendance reports. The Court concluded (at 684) that where there is neither religious instruction conducted by the school in the classroom nor the direct expenditure of public funds involved, "There is no conflict with the establishment of religion clause of the first amendment." And in an analogous strain to our present fact situation, the Court in *Roemer, supra,* at 746 concluded that "religious institutions need not be quarantined from public benefits that are neutrally available to all."

3. There Is No "Excessive" Entanglement With Religion By Allowing The Petitioners' Bible Study Club To Meet And Utilize The School Facilities.

Justice White in his concurring opinion in Roemer asserted (at 768):

> "As long as there is a secular legislative purpose, and as long as the primary effect of the legislation is neither to advance nor inhibit religion, I see no reason — particularly in light of the 'sparse language of the Establishment Clause,' [citing *Nyquist, supra,* at 820] — to take the constitutional inquiry further."

Amicus curiae maintains that a secular purpose has been shown to exist in the present fact situation (as was admitted by both lower courts), and that there is no primary effect to advance or inhibit religion in allowing the Petitioners' Bible study group to meet on the school premises. Consequently, according to Justice White, the inquiry in this case should cease. *Amicus curiae,* however, is determined to prove that there is no merit in the Respondents' argument concerning the Establishment Clause and will, therefore, proceed to discuss the third prong of the *Lemon* test.

The third part of the tripartite test forbids the fostering of "excessive" entanglement between government and religion. This is a concept conceived in *Walz v. Tax Commission, supra,* and was born in *Lemon v. Kurtzman, supra,* scarcely five years ago. The only circumstance in which it

has ever been applied by this Court is that in which a state statute with an ostensibly secular purpose had *earmarked* "immense" amounts of tax funds for the use of church-related schools and, in order to be sure that the funds were not utilized in the religious activities of the school, the statute had provided for continuing and "massive" *government surveillance (Lemon v. Kurtzman, Committee for Public Education v. Nyquist, supra, Meek v. Pittinger,* 421 U.S. 349, 95 S.Ct. 1753, 44 L.Ed. 2d 217 (1975), and *Roemer v. Board of Public Works of Maryland, supra).*

There is no occasion for religiously-motivated governmental surveillance in this case. It has been argued here that under general tort laws a school district has the duty to have an adult present at student activities to minimize the chance that the students will be physically injured by horseplay or otherwise and, therefore, that the presence of a teacher-monitor at the meetings of the Bible study club would foster an impermissible surveillance. This line of reasoning ignores the fact that the surveillance forbidden by the third Establishment Clause test as expounded in *Lemon* and *Nyquist* is *religion*-related surveillance (in that its purpose is to detect religious activity) whereas the "surveillance" under consideration in the present case is safety-related. Impermissible entanglement did not arise out of the truancy-related surveillance provisions of the *Zorach* released time program. Neither does impermissible entanglement arise from safety-related surveillance requirements.

To reiterate, the school district under Education Code, section 10704 merely provides for an audit of any student body funds if the school district in its discretion decides that it is necessary. Such an audit, however, is not by any means required.

The Supreme Court of Wisconsin in *Holt v. Thompson, supra,* in distinguishing the United States Supreme Court parochiaid cases from those dealing with the public schools, stated (at 686) that weekly or monthly reports by the

schools represent only insignificant entanglement (if any at all) as compared to the massive surveillance of millions of dollars in the parochiaid cases. A discretionary and improbable audit of the Petitioners' finances is not only insignificant entanglement, but *amicus curiae* asserts, it is not entanglement at all.

It must be noted that in *Roemer, supra,* although occasional audits were involved, this Honorable Court specifically held (at 763, 764) that such audits were insignificant and were not "excessive" entanglement. The Court also cautioned (at 766) that there "is not exact science in gauging the entanglement of church and state", and that all the factors are to be "considered cumulatively in judging the degree of entanglement." *Amicus curiae* submits there are no cumulative, relevant factors in the present case to be considered as "excessive" entanglement.

In *Meek v. Pittinger, supra* (at 359), one of the more recent United States Supreme Court Establishment Clause decisions, this Court states that its tripartite tests:

> ". . . serve only as guidelines with which to identify instances in which the objectives of the Establishment Clause have been impaired. [Citation] Primary among the evils against which the Establishment Clause protects 'have been sponsorship, financial support, and active involvement of the sovereign in religious activities'." [Citations]

These three objectives of the Establishment Clause — prevention of government sponsorship of religion, prevention of government financial support of religion and prevention of the sovereign becoming involved in religious activities — should be examined to show the maximum involvement of Establishment Clause *values* in this case when one has accepted, *arguendo,* the premise that the Establishment Clause is relevant.

There is absolutely no sponsorship involved. The students do not ask to be sponsored, they ask only to be tolerated. They ask to be tolerated to the extent of being

allowed to meet during the lunch hour — when they are free in every sense except being able to leave the campus or being able to meet to study the Bible — like the other students are allowed to meet. That this *can* be done without sponsorship is conclusively proved by the fact that the students met without sponsorship between January 8, 1974 and June 25, 1974. Further, it must be remembered an adult is required to "chaperone" them while the students meet, and if the chaperone (or sponsor) is faculty, the faculty member is also on his or her free time (as most student club sponsors are volunteers).

The principal "financial support" to religion is allowing these young people to use an otherwise unused room in the school on their free time for their religious discussion and study. This is very similar to the suggestion by Thomas Jefferson when he was Rector of the state-operated University of Virginia which was approved by James Madison who was at that time a member of the University's Board of Visitors (see the opinion of Justice Reed, dissenting in *McCollum, supra,* at 245 et seq.). It is not unlikely that there would be an infinitesimal further increment (e.g., for electricity), but *amicus curiae* fails to understand how this can be seriously argued as "financial support" while at the same time keeping a straight face. Such things must be weighed on the constitutional scales against the immense counterweights such as the deprivations of the freedoms of association, speech and religion. The precise point which the Petitioners urge is that allowing religious meetings to take place on otherwise unused government park property was not the kind of "financial support" which could induce this Court to override the claims of Messrs. *Saia, Kunz* and *Neimotko* without weighing their fundamental rights. Nor did the *de minimis* increment involving lighting expense deter the courts which decided *Keegan v. University of Delaware, Reed v. Van Hoven,* and *Stacy v. Williams, supra,* from considering constitutional rights as well as electrical bills.

If there is any "active" involvement in religious activities concerning this present fact situation, the involvement is insignificant and embraces the material discussed in the preceding paragraph. Announcements will be made by the students at each meeting that the views expressed at the meetings are not necessarily those of the school. If a faculty member must be present at the meetings, he or she will be involved in safety activity, not religious activity. The keynote term is "active" involvement and not passive accommodation. It is significant that the district in this case has already publicly announced its unwillingness to be actively involved with or identified with the Petitioners' club.

It must also be noted that there are decisions of the United States Supreme Court (notably *Nyquist* and *Lemon*) which state that a purpose of the Establishment Clause was to avoid political division along religious lines. It must be repeated that in those cases the issue has been whether states can give away millions of dollars to church-related schools, not whether states can give the same privileges to groups of students who are interested in spiritual matters as are routinely given to groups of students who are interested in secular matters. It was one thing for this Court to consider political divisiveness when invalidating massive grants made directly to institutional religion (*Lemon, supra*). It would be quite another thing for this Court to say that granting students the same privilege to meet and discuss religious matters as is granted to other students to meet and discuss secular matters has a potential for impermissible political divisiveness.

The United States Supreme Court has never held or hinted that religious speech or gatherings should be curtailed because to allow such expression or association might divide the community. To the contrary, this Court has many times, as in *Edwards v. South Carolina*, 372 U.S. 229, 237, 83 S.Ct. 680, 9 L.Ed. 2d 697 (1963), said that "a function of free speech under our system of government is to

invite dispute." One can conjure up many instances in a moment of speculation wherein a certain group's presence as they come together to meet may cause a certain amount of political divisiveness and dispute. It is this type of speech that tyrants seek to suppress but which has been allowed to flower and blossom in the United States throughout its history. This is a most precious right, and a fanciful fear of possible dispute should not be allowed to censor those who seek to enforce their constitutional rights. In the words of Justice Goldberg in *Schempp* (at 308), the relevant distinction in the Establishment Clause cases is the distinction "between real threat and mere shadow." *Amicus curiae* asserts that here we are dealing with nothing but "mere shadow."

II

ASSUMING THAT THE ESTABLISHMENT CLAUSE IS INVOLVED IN THE FIRST ISSUE, THE RIGHTS SOUGHT TO BE PROTECTED BY THE ESTABLISHMENT CLAUSE ARE OUTWEIGHED BY THE VALUE OF OTHER FIRST AND FOURTEENTH AMENDMENT RIGHTS.

The lower court ignored the argument by the Petitioners that there are other First Amendment rights and Fourteenth Amendment rights that clearly outweigh the Establishment Clause factor in this case. *Amicus curiae* believes that it is paramount to recognize that such essential freedoms as speech, association and religion override any considerations or interests that the State may have in preventing a so called establishment of religion. *Amicus curiae* asserts that there is no freedom of religion without the freedoms of speech and association. The "first step", therefore, in State eradication of a certain group's freedom (and eventually, all of society) is to prevent that group from meeting together and communicating. The act of "singling out" the Petitioners' Bible club, *amicus curiae* believes, is that "first step" which must be rescinded in order to preserve freedom as we've come to know it in this country.

A. THE PETITIONERS' TRADITIONAL FIRST AMENDMENT RIGHTS OF FREE EXPRESSION AND ASSEMBLY CANNOT BE CURTAILED IN THIS CASE BY THE RESPONDENTS WITHOUT VIOLATING THE UNITED STATES CONSTITUTION.

Nineteen years ago this Court in *N.A.A.C.P. v. Alabama*, 357 U.S. 449, 460, 78 S.Ct. 1163, 2 L.Ed. 2d 1488 (1958), held that, "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment which embraces freedom of speech." What was originally called "freedom of assembly" — but is now often referred to as "freedom of association" — has in recent years been extended to students. In this respect, the United States Supreme Court has specifically and unanimously ruled that the limitation or denial of the freedom of speech or assembly by a state university on the basis of a subject matter which is neither slanderous nor obscene is violative of the students' First Amendment rights. In *Healy v. James, supra,* a group of student activists (i.e., the Students for a Democratic Society) at a Connecticut state college sought recognition as a student organization. The President of the college denied them recognition. The practical consequence of this action was summarized by this Court as follows (at 176):

> "Denial of official recognition posed serious problems for the organization's existence and growth. Its members were deprived of the opportunity to place announcements regarding meetings, rallies or other activities in the student newspaper; they were precluded from using various campus bulletin boards; and — most importantly — nonrecognition barred them from using campus facilities for holding meetings."

In recognizing an *inherent* general freedom of association, Justice Powell, speaking for the Court, stated (at 180): "At the outset we note that state colleges and universities are not enclaves immune from the sweep of the First Amendment." This Court (at 184) proceeded to hold the University's actions to be a *prior restraint* of the

First Amendment freedom of association, "denying to petitioners' organization the range of associational activities described above." The language with which this Court described the constitutional violation bears repeating (at 181):

> "Among the rights protected by the First Amendment is the right of individuals to associate to further their personal beliefs. While the freedom of association is not explicitly set out in the Amendment, it has long been held to be implicit in the freedoms of speech assembly and petition. There can be no doubt that denial of official recognition, without justification, to college organizations burdens or abridges that associational right. The primary impediment to free association flowing from nonrecognition is the denial of use of campus facilities for meetings and other appropriate purposes."

Although this particular decision involved students at a state university, it is now evident from the decisions of the United States Supreme Court that the same rule will apply at the high school level (see *Tinker v. Des Moines School District*, 393 U. S. 503, 89 S.Ct. 733, 21 L.Ed 2d 731 (1969), discussed *infra*). Further, the United States Court of Appeals for the Seventh Circuit, sitting *en banc*, in a case involving the expulsion of public high school students who published an underground newspaper at their school refused to distinguish a similar case involving the application of constitutional principles to a college. In *Scoville v. Board of Education*, 425 F. 2d 10, 13, footnote 5 (1970), the court said: "The fact that it [the other case] involved a university is of no importance, since the relevant principles and rules apply generally to both high schools and universities."

The fact that constitutional guarantees are now applied to high school students is especially manifested in *Tinker v. Des Moines School District, supra*, the fountainhead of constitutional law as it pertains to public high school students, in which this Court (at 512) specifically noted: "A student's rights . . . do not merely embrace the classroom hours." In fact, the Court stated (at 513) that the high school student's freedom of association is guaranteed even on the high school campus if it does not: (1) "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school," and (2) does not "collid[e] with the rights of others." This two part test must be applied whenever high school students' freedoms of speech and association have been truncated. There is not even the slightest hint (nor has it been argued in this case) that the Petitioners' Bible club would "materially and substantially" interfere with the discipline as it relates to the operation of the public high school. Further, again, there is not the slightest hint (nor has it been argued in this case) that the Petitioners' Bible club would in any way "collide" with the rights of other students — the Petitioners' club is purely voluntary and is conducted on the students' free time during non-classroom hours. In fact, there is no evidence that when the Petitioners' Bible club was allowed to meet on campus that it in any way interfered with school order or collided with the rights of others. In the words of this Court (at 511): "Clearly, the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible."

In affirming the rights of high school students in regard to their First Amendment guarantees, this Court in *Tinker* (at 511) declared:

> "In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the state must respect just as they themselves must respect their obligations to the State. In our system, students may not be regarded as

closed-circuit recipients of only that which the state chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved."

This Honorable Court specifically stated (at 512) that the "principal use to which the schools are dedicated is to *accommodate* students during prescribed hours for certain types of activities. *Among those activities is personal intercommunication among the students.*" (emphasis added). It follows that since the students are compelled by law to be in attendance at the public high school (where they spend the majority of their waking hours), if students are to communicate with one another it is at the school where their freedom of speech and association must be exercised, and (in a parallel vein) it is at the public high school that these rights should be most highly protected.

There are many other decisions that have fallen in line with *Tinker* in protecting student groups from non-recognition or facility denial because of their proposed activities (of which a few examples follow). In *Hudson v. Harris,* 478 F. 2d 244, 246 (1973), the court said: "The test to be applied is whether such an organization would substantially and materially interfere with the discipline necessary to operate the college." In *American Civil Liberties Union v. Radford College,* 315 F. Supp. 893, 896 (1970) the court stated: "[O]nce a public school makes an activity available to its students, faculty, or even the general public, it must operate the activity in accord with first amendment principles." And in *Wood v. Davison,* 351 F. Supp. 543, 546 (1972), the court declared: "It is now clear that constitutional restraints on authorities apply on campuses of state supported educational institutions with fully as much sanction as public streets and in public parks."

An interesting case in point which utilized the *Tinker* rationale is *Garvin v. Rosenau,* 455 F.2d 233 (1972), wherein a public high school system which maintained an ongoing program of student organizations had denied recognition

to a chapter of the Student Mobilization Committee on the ground that its anti-war posture violated a school prohibition against student clubs which expressed a "partisan" point of view. The Federal District Court dismissed the complaint on the ground that under the circumstances a Federal court should voluntarily abstain from intervening in a State matter. The Court of Appeals reversed and in doing so considered the school's contention that there was no substantial federal question. The court said (at 240) that the federal question was not insubstantial and that on remand "the district court should consider . . . the assertion that the defendants have infringed upon the students' First Amendment rights without justification, and the contention that no compelling reason justifies the challenged classification which penalizes 'partisan' ideas." Upon remand the District Court ordered the school authorities to "afford official recognition to the Redford Student Mobilization Committee and that defendants be, and hereby are, permanently enjoined from interfering with the constitutional rights of the plaintiffs in accordance with this order."

A case of special importance (wherein both *Tinker* and *Healy, supra,* were utilized) is *Gay Students Organization v. Bonner,* 509 F. 2d 652 (1974), in which the United States Court of Appeals affirmed a lower court decision granting a student organization its right to meet on a state university campus. At the state university there was an ongoing program of student organizations, but university officials denied a group of students the right to hold social functions on the campus. The court, in determining whether a student club must be granted the right of freedom of association, stated (at 660): "It is immaterial whether the beliefs sought to be advanced by associations pertain to political, economic, *religious* or cultural matters" (emphasis added; as quoted from *N.A.A.C.P. v. Alabama, supra* at 460). Also, the court (at 661) declared: "It is well established that above all else, the First Amendment means that government has no power to restrict expres-

sion because of its message, its ideas, its subject matter, or its content" (citing *Police Department of Chicago v. Mosley,* 408 U.S. 92, 95, 92 S.Ct. 2286, 33 L.Ed. 2d 212 (1972), discussed *infra*). The court emphasized (at 661): "The fact that the Gay Student Organization *alone was made subject to the regulation indicates that the ban is content-related.*" (emphasis added).

The Petitioners' Bible club *alone* was banned from the public high school campus, and this is a clear indication that such censorship was *content-related.* The Petitioners cannot meet because of what they *may* or *intend* to say, and this type of conduct by the government is fervently prohibited by the First Amendment.

By banning the Petitioners from meeting, the Respondents, as agents of the State, would be placing a "prior restraint" on the freedom of expression and association. This Court in *Near v. Minnesota,* 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1931), held that the State cannot regulate in advance what expressions may be uttered or published. The United States Supreme Court in *Near* (at 713) stated that "it has been generally, if not universally, considered that it is the *chief* purpose of the [First Amendment] guaranty to prevent *previous restraints* upon publication." (emphasis added). As one commentator has remarked, "[I]t is quite clear that the Court has chosen to react strongly against any prior-in-form governmental encroachment on free expression" (Murphy, *The Prior Restraint Doctrine in the Supreme Court: A Reevaluation,* 51 Notre Dame Lawyer 898, 898-96). Indeed, this Court in *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58, 70, 83 S.Ct. 631, 9 L.Ed. 2d 584 (1963), held that any prior restraint on free expression bears "a heavy presumption against its constitutional validity", and will be closely scrutinized by the Court.

In *Tinker, supra,* (at 503) this Court held that expression or conduct could be abridged prior to its occurrence only in the presence of "*facts* which might reasonably have led

school authorities to *forecast substantial disruption or material interference* with school activities." (emphasis added). The crucial word "facts" is essential to the understanding of the Court's statement in this instance (*Prior Restraints in Public High Schools,* 82 Yale Law Journal 1325, 1329, 1333). Particular facts are so important that this Court has refused to permit regulation on the basis of experience in previous similar events. For instance, in *Kunz v. New York, supra,* (at 294-95) the Court remarked:

> "The court below has mistakenly derived support for its conclusion from the evidence . . . that appellant's religious meeting had in the past caused some disorder. There are appropriate public remedies to protect the peace and order of the community if appellant's speeches should result in disorder or violence. . . . We do not express any opinion on the propriety of punitive remedies which New York authorities may utilize. We are here concerned with suppression — not punishment."

Such "facts" said the *Tinker* Court (at 508), must validly indicate to the school authorities a reasonable belief that to allow expression by students would cause "substantial and material" disruption or interference with school discipline. This is distinguished by this Court in *Tinker* (at 508) from the "undifferentiated fear or apprehension of disturbance [which] is not enough to overcome the right to freedom of expression" in high schools. As one commentator has said, *Tinker,* "despite permitting some restraints, grants extensive first amendment rights to high school students, rights not subject to limitations merely to prevent embarrassment or discomfiture to school authorities" (*Recent Decisions — First Amendment — Prior Restraint,* 35 Maryland Law Review 512, 522). In this regard another commentator goes so far to suggest that "neither the nature of the *Tinker* test, nor the nature of the high school as an institution, whether in calm or stormy times, warrants prior restraints in high schools where they would not be warranted in society at large" (*Prior Restraints*

in Public High Schools, 82 Yale Law Journal 1325, 1334). The conclusion, therefore, as one commentator has suggested, is that only "if school authorities can show the accompanying conduct would materially and substantially interfere with the discipline requirements may there be a restriction on freedom of expression" (*Students' Constitutional Rights in Public Secondary Education,* 14 Washburn Law Journal 106, 114).

The question is, therefore, in the face of the *Tinker* Court's hard stand against prior restraint of a student's freedom within the public school itself, whether or not the fact that religious students want to meet is a valid basis for which school officials could reasonably predict a substantial or material disruption of the operation of the school? The answer would have to be in the negative since these students merely want the opportunity to "peacefully" associate and communicate ideas, both religious and secular. On target was this Court in *Tinker* (at 513) when it said:

> "Under our Constitution, free speech is not a right that is given only to be circumscribed that it exists in principle but not in fact. Freedom of expression would not truly exist if the right could be exercised only in an area that a benevolent government has provided as a safe haven for crackpots. The Constitution says that Congress (and the States) may not abridge the right to free speech. This provision means what it says."

"Freedom to speak would be a hollow right if a concomitant right to hear the speech did not exist" (*The Right to Receive,* 63 Georgetown Law Journal 775, 777-78). In this respect, the United States Supreme Court in *Martin v. City of Struthers,* 319 U.S. 141, 143, 63 S.Ct. 862, 87 L.Ed. 1313 (1943), recognized the right to receive information. (This Court has also recognized the right to receive information in *Lamont v. Postmaster General,* 381 U.S. 301, 305, 308, 85 S.Ct. 1493, 14 L.Ed. 2d 398 (1965); *New York Times v. Sullivan,* 376 U.S. 254, 272, 84 S.Ct. 714, 11 L.Ed.

2d 686 (1964); *Griswold v. Connecticut,* 381 U.S. 479, 482, 85 S.Ct. 1678, 14 L.Ed. 2d 510 (1965); *Stanley v. Georgia,* 294 U.S. 557, 564, 89 S.Ct. 1243, 22 L.Ed. 2d 542 (1969); and *Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367, 390, 89 S.Ct. 1794, 23 L.Ed. 2nd 371 (1969).) Moreover, the "right to hear" has now been extended to high school students by the lower federal courts (*Vail v. Board of Education,* 354 F.Supp. 592 (1973); *Wilson v. Chancellor,* 418 F.Supp. 1358 (1976); and, *Lawrence University Bicentennial Commission v. City of Appelton,* 409 F.Supp. 1319 (1976)).

The noted educator, author and philosopher, Professor Alexander Meiklejohn, argued that the First Amendment protects the listener, not the speaker (Meiklejohn, *Political Freedom* 26). A listener's right to hear may only be curtailed by the State when the State's interest involved would justify similar limitations of other First Amendment rights (*The Right to Receive,* 63 Georgetown Law Journal 775, 778). Since there is doubtful validity in an Establishment Clause claim in this present case, there would appear to be no compelling State interest in denying such religious students the right to meet.

The right to hear is of particular importance when dealing with the freedom of association because the right to hear is basically a "group right." As Leon Green has commented (Green, *The Right to Communicate,* 35 N.Y.U. Law Review 903):

> "The right to communicate is a two way concept: the right to give and the right to receive information and ideas; the right to advocate, teach and write; the right to hear, read, reply and reject . . . any right the individual has to communicate is but a reflection of the group right, a relational rather than an individual interest."

It must be noted that not only involved are the rights of those religious students who may want to attend the gathering or club (whether for religious reasons or not).

The right to hear, therefore, extends beyond those specific religious students desiring to meet to those who may wish to attend the Bible club gatherings for debate or to voice disapproval.

The Petitioners have the right to hear the particular speaker at their club meetings as well as the right to hear the speech of one another. The State (in the form of the Respondents) has no compelling State interest in denying the essential freedoms of speech and association (including the right to hear) even if it is vehemently opposed to the message. As Justice Oliver Wendell Holmes made clear (Warren, *A Republic If You Can Keep It* 3-4):

> "If there is any principle of the Constitution that more imperatively calls for attachment than any other, it is the principle of free thought — not free thought for those who agree with us but freedom for the thought that we hate."

B. THE PETITIONERS' RIGHT TO THE FREE USE OF A PUBLIC FORUM, A MODERN PENUMBRAL RIGHT OF CONSTITUTIONAL DIMENSION, CANNOT BE RESTRICTED WITHOUT VIOLATING THE UNITED STATES CONSTITUTION.

In 1972 the United States Supreme Court announced a constitutional right fashioned from First Amendment freedoms and the Equal Protection Clause which has come to be known as the "freedom of a public forum." This unanimous decision in *Mosley, supra,* involved a city ordinance which forbade picketing within 150 feet of a public school building except for picketing in connection with labor disputes. The defendant was convicted of carrying picket signs which accused a public school of racist policies. Because the ordinance discriminated against non-labor dispute picketing on the basis of *subject matter* (content) this Court invalidated the ordinance in these words (at 96-97):

> ". . . under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. . . . Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. . . . In *Niemotko v. Maryland,* 340 U.S. 268 (1951), a group of Jehovah's Witnesses were denied a permit to use a city park for Bible talks, although other political and religious groups had been allowed to put the park to analogous uses. . . . [T]his Court held that the permit refusal violated 'the right to equal protection of the laws, in the exercise of those freedoms of speech and religion protected by the First and Fourteenth Amendment.' "

This Court particularly noted (at 100) that the Chicago ordinance itself determined that peaceful picketing would not be an undue interference with the schools. The Respondent district in this present case has also determined that on-campus meetings of student organizations (as well as the Petitioners' Bible club) will not be an undue interference with the schools since they are allowed to meet (as was the Petitioners' club until its rights to free speech and association were *revoked*).

The California courts had isolated and articulated the penumbral constitutional right to freedom of a public forum a quarter of a century earlier. The first decision which did so involved the use of a public high school facility for the purpose of holding non-curricular meetings. In *Danskin v. San Diego Unified School District,* 28 Cal. 2d 536 (1946), a portion of the California Civic Center Act was held unconstitutional. Although the defendants' high school auditorium was made available to outsiders as a meeting place, it was denied to the A.C.L.U. under the mistaken belief that denial was legally compelled because the Civic Center Act exempted subversive organizations from eligibility to use school facilities as a meeting place, and the

A.C.L.U. refused to sign an affidavit that it was not a subversive organization. The court said (at 545, 548):

> "The state is under no duty to make school buildings available for public meetings . . . If it elects to do so, however, it cannot arbitrarily prevent any members of the public from holding such meetings . . .
>
> It is not for the state to control the influence of a public forum by censoring the ideas, the proponents, or the audience; if it could, that freedom which is the life of democratic assembly would be stilled."

The *Danskin* decision is far from being alone in holding that meeting space on the campus of a public educational institution is an appropriate "forum." (See, e.g.: *East Meadow Com. Con. Ass'n. v. Board of Ed.*, 272 N.Y.S. 2d 341 (1966); *National Socialist, etc. Party v. Ringers*, 473 F. 2d 1010 (1973); *Buckley v. Meng*, 230 N.Y.S. 2d 924 (1962); *Snyder v. Board of Trustees, etc.*, 286 F. Supp. 927 (1968); and by inference see *Garvin v. Rosenau, supra*, specifically involving high school clubs.)

The Respondent district has itself determined that an ongoing program of student organizations is an appropriate forum for the discussion of ideas at its school. It cannot now deny that forum to the Petitioners on the basis of the subject matter of the ideas to be discussed. Had it not created that forum Petitioners would have no claim to use public property for Bible study purposes (e.g., see *Hunt v. Board of Education Kanawha County*, 321 F. Supp. 1263 (1971), in which student prayer not connected with an ongoing student club program or any other school-established forum was held by a Federal judge not to be privileged). Huntington Beach Union High School District, however, has created an ongoing student club program, and the cases clearly illustrate that these Petitioners may not be excluded from the forum thus created unless, of course, the First Amendment which includes a guarantee of religious liberty is somehow construed so that religion is the one subject not protected by the freedom of a public forum.

C. THE PETITIONERS' RIGHT TO THE EQUAL PROTECTION OF THE LAWS CANNOT BE DENIED WITHOUT VIOLATING THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Although the constitutional right to freedom of a public forum has equal protection overtones, there are also cases which reach the same conclusion entirely upon pure Equal Protection Clause principles. In *Stacy v. Williams, supra,* a three-judge Federal District Court reviewed all the rules of the University of Mississippi which bore on the subject of outside speakers on campus. Among the rules considered by the court, one provided that facilities of the university could not be made available for public religious meetings or gatherings to off-campus persons or groups of persons. The court invalidated the regulation (at 975-76), saying:

> "[Because] this regulation can reasonably be construed to mean that no student religious group may invite outside speakers on religious topics, which prohibition would conflict with the Equal Protection Clause, it must be rejected . . ."

Stacy v. Williams illustrates that "religion" is not a reasonable classification and that a state may not choose the broad classification of "religion" for exclusion in its public educational institutions and justify the classification on Equal Protection principles. As noted in *Danskin, supra,* (at 550), "freedoms of speech and of press, of assembly, and of worship may not be infringed" on the "slender grounds" that the Fourteenth Amendment has been complied with in a general way.

The liberties of expression and association, the freedom of a public forum, and the right to the equal protection of the laws are in a sense all of a single fabric which is the fabric of free and equal communication involving the right to *receive* communication (see *James v. Nelson*, 349 F. Supp. 1061, 1063 (1972)), as well as the right to *impart* communication. This right of communication has a value to weigh on the scales against whatever Establishment Clause value is involved in allowing these students to use

an empty school room for Bible discussion purposes just as other students are allowed to use other empty rooms for secular discussion purposes.

What is the value of these communication rights? It might be argued that to deny these students the privilege of studying the Bible during the lunch hour does not completely destroy their right to communicate. Further, it might be argued that only one subject matter is eliminated, leaving communication perfectly open on all other subjects; and even as to that one subject matter, communication is open to the students on private premises. Thus, the argument goes, there is not *really* much of an infringement upon communication. A not dissimilar argument was made in *Thomas v. Collins*, 323 U.S. 516, 65 S.Ct. 315, 89 L.Ed. 430 (1945), wherein a national labor union officer was held in contempt of an *ex parte* restraining order enjoining him from soliciting union members without first registering with the state. It was argued that it was a small thing to ask him to register. This Court, however, replied (at 543): "The restraint is not small when it is considered what was restrained." The Court (at 530) held that in weighing the value of First Amendment freedoms against the right of a State to exercise the police power, "it is the character of the right, not of the limitation" which is placed upon the scales of justice.

The contention that has been made that these student communication rights are to be given little or no value because the students could meet off campus has been made by other government attorneys. It has, however, been disposed of by this Court. For example, in *Schneider v. State*, 308 U.S. 147, 163, 60 S.Ct. 146, 84 L.Ed. 155 (1939), this High Court proclaimed: "[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." And in *Healy v. James, supra*, at 183, the Court stated: "[T]he [student] group's possible ability to exist outside the campus community does not ameliorate significantly the disabilities imposed by [the non-recognition of

the group]. We are not free to disregard the practical realities." The practical realities are that if students are to communicate with students on *any* subject they must do so where students come together: *at school!*

D. THE PETITIONERS' RIGHT TO THE FREEDOM OF RELIGION IS DENIED BY THE RESPONDENT'S REFUSAL TO ALLOW THE PETITIONERS' BIBLE STUDY CLUB TO MEET SINCE THE FREEDOM OF RELIGION TAKES PRECEDENCE OVER THE ESTABLISHMENT CLAUSE WHENEVER THERE IS CONFLICT BETWEEN THE TWO RELIGION CLAUSES OF THE FIRST AMENDMENT (ASSUMING THE ESTABLISHMENT CLAUSE IS EVEN INVOLVED).

As one commentator has noted, students possess the right to exercise their religion freely under the First Amendment (*Religious Rights of Public School Teachers*, 23 U.C.L.A. Law Review 763). This Court in *Tinker*, as alluded to *supra*, buttressed the rights of high school students by holding (at 511) that students' "freedom of expression of their views" would be protected unless there was a showing that the United States Constitution would provide otherwise.

The First Amendment as applied to the states by the Fourteenth Amendment forbids the government from prohibiting the Free Exercise of Religion. This important freedom was written into the United States Constitution to ensure that the rights to freedom of religion would not be met with hostility from the State. Hostility occurs when the government, as in this case, forbids the expression of religion without substantial and constitutionally valid reasons.

As the two Religion Clauses have been interpreted in this century, it has been specifically noted that in certain situations there is a conflict between the Free Exercise and Establishment Clauses. The United States Supreme Court has recognized this internal conflict within the First Amendment Religion Clauses and has called it a "paradox" (*Schempp, supra*, at 299).

As a result of this internal conflict, the Free Exercise Clause was for a short time subordinated to the Establish-

ment Clause and other First Amendment rights and freedoms in importance. The only time that Free Exercise of Religion was given its true constitutional value was when it was somehow fused with freedom of speech or other related First Amendment rights.

In *Sherbert v. Verner,* 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed. 2d 965 (1963), this Court again recognized the full importance of the Free Exercise Clause. The case involved a Seventh-Day Adventist who had refused to accept weekly employment because it required her to work on Saturday. The tenets of her religion set aside Saturday as the Sabbath, or day of rest. Subsequently, the plaintiff sought unemployment benefits, but because she had refused gainful employment the benefits were denied to her. The plaintiff claimed this was a violation of her Free Exercise of Religion. If a strict neutrality approach to the Establishment Clause had been the position of this Court, then it is apparent the government would be prohibited from paying unemployment benefits to the plaintiff, i.e., aiding a religious practice by supporting a person with public funds who did not work for religious reasons. The Court, however, accommodated the sabbatarian in subordinating the Establishment Clause to the Free Exercise Clause, implying that the Free Exercise Clause takes preeminence over the former. This case was indeed a turning point for freedom of religion.

In *Wisconsin v. Yoder, supra,* this Court hoisted the Free Exercise Clause above other First Amendment freedoms. Amish plaintiffs claimed they were denied the free exercise of religion by the state of Wisconsin. Wisconsin law required children to attend a state-approved school until the age of sixteen. The Amish parents sought to remove their children from the public grade school following graduation. Thereafter, the children would be taught at home under the guidance of the parents. This Court speaking through Chief Justice Burger, upheld the freedom of religion claim, and the protection this clause affords a claimant soared to the forefront. As Leo Pfeffer has

written, "the Free Exercise Clause has become the favored child of the first amendment" (Pfeffer, *The Supremacy of Free Exercise,* 61 Georgetown Law Journal 1115, 1142. This article traces in detail free exercise's rise to supremacy).

The implications flowing from the preeminence of the right to freedom of religion are tremendously far reaching. It basically means that whenever conflict arises between the two Religion Clauses "establishment is *automatically* to be subordinated to exercise" (Swartz, *No Imposition of Religion: The Establishment Clause,* 77 Yale Law Journal 692, 706).

With this constitutional development of the Free Exercise Clause, infringement on the freedom of religion, even though slight, leads to a violation of this precious First Amendment right. This Court in *Sherbert v. Verner,* although noting a substantial infringement of free exercise in that case, did not hold that this constituted the legal standard for determining the State's burden. Quite to the contrary, this Court held (at 404, quoting *Braunfield v. Brown,* 366 U.S. 599, 607, 81 S.Ct. 1144, 6 L.Ed. 2d 563, *reh. denied,* 368 U.S. 869, 82 S.Ct. 22, 7 L.Ed. 2d 70 (1961)):

> "[I]f the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect."

This Court further indicated that if State action was to be upheld (at 403):

> "[I]t must be because [it] represents *no* infringement by the State of [the] constitutional rights of free exercise, or because any incidental burden on the free exercise of . . . religion may be justified by a 'compelling state interest in the regulation of a subject within the State's constitutional power to regulate . . .'" [citation]

Even an "incidental" burden on the Free Exercise of Religion must be justified by a "compelling state interest." Therefore, as the Supreme Court of Delaware held in *Keegan v. University of Delaware, supra* (at 17):

> "Once the individual demonstrates some Constitutional burden, whether substantial or incidental, direct or indirect, upon his free exercise of religion, the State must show a 'substantial interest' sufficient to sustain its acts."

As illustrated, *supra,* the Establishment Clause issue is so very weak in the present factual setting, and, coupled with the preference of the Free Exercise Clause over the Establishment Clause, any claim by the Respondents to deny the Petitioners' Bible club the right to meet on school premises is rendered moot. The Free Exercise of Religion, being an ancient freedom, is a fundamental American right. The State must, therefore, show a "compelling state interest" in order to deny this freedom, and that the State cannot do. As this Court emphasized in *Wisconsin v. Yoder* (at 220-21):

> "The Court must not ignore the danger an exception from a general obligation of citizenship on religious grounds may run afoul of the Establishment Clause, but that danger cannot be allowed to prevent any exception no matter how vital it may be to the protection of values promoted by the right of free exercise."

On one side of the scale is an empty school room. Being empty, it would hardly move the scale even if it were being balanced against nothing, especially since there is no governmental purpose other than to be fair, grant equality and give an opportunity for student intercommunication. On the students' side of the scale there is to be weighed almost every one of the freedoms that are most valued by our nation's fundamental laws. Those freedoms so weigh down the students' side of the scale that to deny them their Bible club is to deny them freedoms that have been in the forefront of constitutional protection for 200 years.

III

IN THE CONTEXT OF AN ONGOING PROGRAM OF RECOGNIZING STUDENT ORGANIZATIONS AND GRANTING USE OF SCHOOL FACILITIES FOR MEETING AND COMMUNICATION PURPOSES, A SCHOOL DISTRICT IS NOT PROHIBITED BY THE CALIFORNIA CONSTITUTION (OR OTHER CALIFORNIA LAW) FROM GRANTING THE SAME PRIVILEGES TO A STUDENT GROUP WITH RELIGIOUS INTERESTS AS ARE GRANTED TO STUDENT GROUPS WITH SECULAR INTERESTS.

Two portions of the California Constitution have been raised to prohibit the Bible club activities proposed by the Petitioners and their fellow students. They are:

> ". . . nor shall any sectarian or denominational doctrine be taught, or instruction thereon be permitted, directly or indirectly, in any of the common schools of this State."
>
> Article IX, Section 8.

> "Neither the Legislature, nor any county [or] . . . school district . . . shall ever . . . grant anything to or in aid of any religious sect, church, creed, or sectarian purpose. . . ."
>
> Article XVI, Section 5.

A. ARTICLE IX, SECTION 8 DOES NOT FORBID THE ACTIVITIES PROPOSED BY THE PETITIONERS.

This particular constitutional section employs the unusual term, "common schools." This term was chosen by the drafters of Article IX as a special term inclusive only of primary and grammar schools (*Los Angeles County v. Kirk,* 148 Cal. 385, 389 (1905); also see Louisell and Jackson, *Religion, Theology and Public Higher Education,* 50 Cal. L. Rev. 751, 769), and thus, by its own terms, the section is not applicable to high schools.

Even if the section applied to high schools it would apply only to "instruction" and things that are "taught." It would take a very strained construction of those terms to apply them to the intercommunication of ideas among

students which would take place. The obvious meaning of teaching and instruction in this constitutional section is a purely *curricular* one. There is no intention shown in the language of the section to prevent discussion among students about God. As stressed in *Gordon v. Board of Education,* 78 Cal. App. 2d 464, 472-73 (1947), the section intends to restrict the permissible activities of the sovereign, not the permissible activities of individuals:

> "Reference to the debates of the constitutional convention which presented the Constitution of 1879 to the people of California demonstrates that there was no thought whatsoever in the minds of the framers of that document in opposition to or of hostility to religion as such. They proposed to insure separation of church and state, and to provide that the power and authority of the state should never be devoted to the advancement of any particular sect or denomination."

To single out religion as the *only* subject which may not be voluntarily and extracurricularly examined in the milieu of the public schools is most certainly an act *hostile* to religion.

B. ARTICLE XVI, SECTION 5, DOES NOT FORBID THE ACTIVITIES PROPOSED BY THE PETITIONERS.

As noted in the quotation from *Gordon v. Board of Education, supra,* it was to prevent the sovereign from *active advancement* "of any particular sect or denomination" that the California constitutional convention addressed its provisions. The difference between that which is "sectarian" in the sense of being narrowly denominational and that which is "religious" was recognized in *Evans v. Selma Union High School District,* 193 Cal. 54, 57 (1924), and in *In re Wood,* 108 Cal. App. 694, 696 (1930). Further, in *Evans* (at 59) the Bible, being a book which transcends denominationalism, was specifically and unequivocally held to be other than sectarian. It is this same non-sectarian book with which this present action is concerned.

This section of the California Constitution has been characterized by the Attorney General of California as "the definitive statement of the principle of government impartiality in the field of religion" (37 Ops. Cal. Atty. Gen. 105, 107). In *Frohliger v. Richardson,* 63 Cal. App. 209, 217 (1923), it was held under this section that even if a statute has some identifiable secular objective, such fact will not immunize it from analysis to determine whether it also has the *direct, immediate* and *substantial* effect of advancing religion. In *Frohliger,* the court struck down a statute which appropriated money for the restoration of the San Diego Mission although it concluded that secular (i.e., historical and cultural objectives), as well as religious ends, were aided by the statute.

However, in *California Educational Facilities v. Priest,* 12 Cal. 3d 593, 605 (1974), the court stated that this "section has never been interpreted . . . to require governmental hostility to religion, nor to prohibit a religious institution from receiving an *indirect, remote* and *incidental benefit* from a statute which has a secular primary purpose." (emphasis added). In *Priest* the facts were such that the state treasurer had declined to proceed with selling certain bonds authorized by the California Educational Facilities Authority Act (Education Code, section 30301 et seq.). The treasurer's reason for refusal was based upon questions that had been raised concerning the constitutionality of the Act under then Article XIII, Section 24, of the California Constitution (it is now Article XVI, Section 5). A writ was sought to compel the treasurer to proceed as called for by the Act. The Supreme Court of California issued the writ, holding that the Act neither violated the Establishment Clause of the First Amendment of the United States Constitution nor the state constitutional proscription already noted.

In *Priest,* in the spirit of "accommodating neutrality," Justice Mosk specifically noted (at 601) that "[t]he benefits of the Act are available to all non-public institutions of higher education in the state, whether sectarian or non-

sectarian.'' Then, invoking the United States Supreme Court in *Hunt v. McNair, supra,* Justice Mosk proclaimed (at 601):

> ''[I]n evaluating the 'primary effect' of the legislation in [the cited case], the court reiterated its prior rejection of the argument, also advanced by respondent here, that all governmental assistance to a sectarian organization is forbidden under the establishment clause 'because aid to one aspect of an institution frees it to spend its other resources on religious ends.' [Citation] Rather, a state may constitutionally 'provide church-related schools with secular, neutral, or non-ideological services, facilities, or materials.' (*Lemon v. Kurtzman* (1971) . . . 403 U.S. 602, 616 [29 L.Ed. 2d 745, 747-758])''

If the State of California can permissively lend the massive power of its treasurer in aid of a sectarian institution to assist in financing the construction of educational facilities, then to *allow* a group of high school students to utilize an otherwise unused school room to discuss the Bible on their free time is well within the rule quoted. As Justice Mosk stated in *Priest* (at 601):

> ''[T]here can be no claim in the instant case that the proposed project runs afoul of this test. As noted, the University of the Pacific is not affiliated with any religious organization. *But even if it were, neither the Act nor the proposed project would have the impermissible primary effect of advancing religion.*'' (emphasis added).

To allow the Petitioners to sit in an unused school room on their free time at Edison High School and discuss the Bible in the presence of a faculty member, on his or her free time and present to keep order, cannot seriously be regarded as imparting an action by the district to ''grant anything to aid or in aid of any religious sect.''

If for any reason it can be seriously urged that Article IX, Section 8 and/or Article XVI, Section 5, of the California Constitution prohibits the Petitioners' intended conduct on the school premises, then *amicus curiae* asserts that these sections run afoul of the United States Constitution (as being violative of the First and Fourteenth Amendments respectively).

SUMMARY OF ARGUMENT

This Court has consistently held that it is within constitutional parameters to accommodate the religious interests of the citizens of the United States. Since the decision in *Tinker, supra,* the fundamental right of the freedom of expression (which includes the freedoms of association and religion) has been extended to high school students. Even though the Respondents have argued that the Establishment Clause is the controlling constitutional provision in this case, it is apparent from the facts involved and decisions of this High Court that the Establishment Clause issue is so deficient that it is not even a factor to be reckoned with here.

The freedoms of speech, association and religion as well as the equal protection of the laws, clearly outweigh any State interest in banning the Petitioners from utilizing an otherwise unused room on the public high school campus for the purpose of Bible study. Such an act of singling out the Petitioners and prohibiting them from associating is clearly an act of discrimination and is obvious evidence of hostility toward the Petitioners because of their religious interests.

If there are any State of California provisions which conflict with those federal constitutional guarantees discussed *supra,* then such California laws must fall. The State of California cannot be allowed to frustrate the mandates of the United States Constitution.

CONCLUSION

Perhaps the solution of the whole Establishment Clause issue lies in the fact that before there can be an Establishment Clause violation there must be some ''state action'', a term used in several constitutional contexts.

The first decision to hold that the Establishment Clause is binding upon the states was *Everson v. Board of Education, supra.* After holding the Establishment Clause to be applicable, this Court upheld a New Jersey statute, saying (at 18):

> "The Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them."

A Federal Court of Appeals, sitting *en banc,* in *National Socialist White People's Party v. Ringers, supra,* applied this principle of neutrality to an Equal Protection case wherein a school board in Virginia, whose normal policy was to allow outside organizations to use its high school auditorium for meetings, refused to allow the Nazi party the use of the auditorium because the Nazi party had racial restrictions in its membership qualifications and it was thought by the school board that if the board allowed a racially discriminatory organization to use a public facility for a meeting place this would be "state action" which would make the board a party to racial discrimination under the cases interpreting the Equal Protection Clause. Inasmuch as the presence of "state action" is also a condition precedent to the application of the Establishment Clause, the court had a ready analogy in the *Everson* case. The court declared (at 1017):

> "The essential point here is not that there is insufficient state action, but simply that the state action doctrine is not applicable where a group seeks to exercise first amendment rights in a public forum . . .
>
> The case is not unlike *Everson v. Board of Education.* . . . Just as New Jersey in *Everson* did not transgress the establishment clause . . . by providing transportation . . . so, too, Virginia would not . . . unconstitutionally support the [Nazi] Party by providing a public forum. Although the establishment

> clause prohibited New Jersey from setting up a church, or enacting laws favoring one religion over another, or forcing a person to profess a belief or disbelief in any religion, New Jersey was prohibited from hampering its citizens in the exercise of their own religion by denying generally provided government services to certain groups. . . . In *Everson,* the state's payments were upheld because 'that amendment [the first amendment] requires the state to be neutral. . . .' "

Further, the court maintained (at 1016): "No case suggests that in maintaining a street, park or public meeting place, a state espouses the views which may be there expressed." Totally denying state action in this instance, the court remarked (at 1014):

> "This partial dedication as a forum for the exercise of first amendment rights makes the school auditorium conceptually indistinguishable for first amendment purposes as a 'public place' from streets and parks which too, are acquired and maintained at public expense."

Amicus curiae asserts that there is no state action in this particular case before the Court. The Respondent district has demonstrated in a most excruciating fashion that it is strictly neutral concerning the Petitioners' club to such an extent that its actions are hostile in nature. Moreover, the district would not be acting voluntarily in allowing the Petitioners to meet, but under constitutional compulsion.

If the district had chosen to accommodate the religious interests of its students who practically make their homes in the public schools, there would not have been involved any sponsorship or any support or any active involvement of the sovereign in a religious activity (*Walz, supra,* at 668). Further, if the district had chosen to accommodate the Petitioners' interests it would not have done so with a religious purpose but only for the purpose of maintaining good public relations with its students (while ensuring

their constitutional rights), or for the purpose of being reasonable, or maybe just to be accommodating. And if the district had chosen to accommodate those interests it would not have advanced religion in the sense that term is utilized by the decisions involving *passive* religious participation by the public schools (as is demonstrated by *Zorach, supra*, and other decisions approving such participation).

If the district had accommodated its students' religious interests it would have done nothing more than was done at the University of Virginia about 200 years ago at the suggestion of Thomas Jefferson and James Madison. It is interesting to note that when Congress initially authorized the public schools for the nation's capital, the first president of the school board was Jefferson himself. The first official report on file indicates that the Bible and the Watts Hymnal were the principal, if not the only, books then in use for reading by the students.

It would not be enough, however, for the decision in this case to merely point out these obvious truths. For decades American educators and students have labored under the dark shadow of the layman's belief that the United States Supreme Court has ruled that nothing of religious nature can take place on the campus of a publicly supported educational institution even if there is no connection between the activity and the school. And this, despite the fact that Mr. Justice Clark, the author of the opinion in *Schempp, supra,* has attempted on various occasions to make clear that "the Court has specifically held only one thing with specific reference to prayer in the public schools and that is that a required prayer in the public school violates the Establishment Clause" (published official transcript of Justice Clark's address on November 5, 1964, as the featured speaker of a symposium on *"Religion and the Public School"* at Wartburg College, Waverly, Iowa, at 46).

Amicus curiae sincerely believes that the Respondents in this present case are straining at gnats while swallowing camels. The Respondents have specifically singled out the Petitioners and have denied them their constitutional rights. In the process, the Petitioners have been denigrated to the position of second class citizens in a school system which is required by law to treat them neutrally, not with hostility. *Amicus curiae* asserts that the Petitioners should not be denied the right to the freedom of association just as the Nazis and other minorities were not denied this sacred constitutional right.

The people of California in drafting their constitution, utilizing their words like a surgeon wields his scalpel, proclaimed in their preamble: "We, the People of the State of California, grateful to Almighty God for our freedom, in order to secure and perpetuate its blessings, do establish this Constitution." Never in their wildest imaginations did the drafters of this instrument conceive that one day their constitution could be argued in such a manner as to prohibit a group of students such as the Petitioners from meeting in the public schools.

Amicus curiae fervently urges this Honorable Court to put to rest in the strongest possible terms the insidious and simplistic idea that governmental ownership and control of property generally, and educationally employed property in particular, is the sole criterion by which private religious activity is measured on the scales of the Establishment Clause of the First Amendment. It is further urged by *amicus curiae* that many fundamental constitutional rights are being violated under this misapplication of the Establishment Clause, and the Respondent district has failed to take into account the value of the constitutional rights of these students for no higher a reward than that an empty school room (not "classroom") can be kept empty.

As this Court so eloquently stated in *Tinker* (at 506):

> "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."

Such a sacrifice of our precious and essential liberties should not, we submit, be made without this court's review.

The decision of the court below conflicts with the First and Fourteenth Amendments to The United States Constitution as well as recent decisions rendered by this Court and lower federal courts. It is essential that the conflict be resolved promptly, lest by unconstitutional restraint fundamental rights are strangled, and are, therefore, denied the Petitioners. The issue is one of such magnitude and of such great constitutional importance that it should be decided by this Honorable Court.

Respectfully submitted,

ROBERT L. TOMS
Attorney for Amicus Curiae
Center for Law and Religious
Freedom of the Christian
Legal Society

CALDWELL & TOMS
611 West Sixth Street
Los Angeles, CA 90017
Tel.: (213) 628-1300

Of Counsel:
JOHN W. WHITEHEAD
3240 Fay Avenue
Los Angeles, CA 90034
Tel.: (213) 836-5192

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES } ss.

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Los Angeles, State of California, over the age of eighteen years and not a party to the within action or proceeding; or

My business address is 424 East 15th Street, Los Angeles, California 90015, that on July 6, 1977, I served the within BRIEF AMICUS CURIAE OF THE CENTER FOR LAW AND RELIGIOUS FREEDOM OF THE CHRISTIAN LEGAL SOCIETY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI (BRUCE JOHNSON, etc., et. al. vs. HUNTINGTON BEACH UNION HIGH SCHOOL DISTRICT, et. al.) on the following named parties by depositing the designated copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Los Angeles, California, addressed to the parties at the addresses as follows:

DAVID C. LARSEN
Rutan & Tucker
401 Civic Center Drive
West
Santa Ana, CA 92702
(3 copies)

THOMAS M. WHALING
218 Main Street
Huntington Beach, CA
92648
(3 copies)

DAVID A. LEHRER
6505 Wilshire Blvd.
Suite 814
Los Angeles, CA 90048
(3 copies)

I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 6, 1977, at Los Angeles, California.

(Robert T. Clark, Jr.)